No. _____

IN THE

Supreme Court of the United States

October Term, 1987

WARDS COVE PACKING COMPANY, INC.,
CASTLE & COOKE, INC.,

Petitioners,

v.

FRANK ATONIO, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does statistical evidence that shows only a concentration of minorities in jobs not at issue fail as a matter of law to establish disparate impact of hiring practices where the employer hires for at-issue jobs from outside his own work force, does not promote-from-within or provide training for such jobs, and where minorities are not underrepresented in the at-issue jobs?

2. In applying the disparate impact analysis, did the Ninth Circuit improperly alter the burdens of proof and engage in impermissible fact-finding in disregard of established precedent of this Court?

3. Did the Ninth Circuit commit error in allowing plaintiffs to challenge the cumulative effect of a wide range of alleged employment practices under the disparate impact model?

4. Was it error for the Ninth Circuit to expand the reach of the disparate impact theory to employment practices such as word of mouth recruiting, subjective application of hiring criteria, and other practices that do not operate as "automatic disqualifiers?"

LIST OF PARTIES

Petitioners are Wards Cove Packing Co., Inc., and Castle & Cooke, Inc., who were defendants in the trial court proceeding. (Claims against a third defendant, Columbia Wards Fisheries, were dismissed. This was affirmed on appeal. *See* fn. 2 *infra.*)

Respondents are Frank Atonio, Eugene Baclig, Randy del Fierro, Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Joaquin Arruiza, and Barbara Viernes (as administratix of the Estate of Gene Allen Viernes), who were individual plaintiffs and representatives of a class of all nonwhite employees in the trial court proceeding.

Rule 28.1 disclosure:

Wards Cove Packing Company, Inc. is a privately-held domestic corporation. Castle & Cooke, Inc. is a publicly-held and traded domestic corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS, *(continued)*

TABLE OF CONTENTS, *(continued)*

TABLE OF AUTHORITIES

Table of Cases *Page*

TABLE OF AUTHORITIES, (continued)

Cases, (continued) *Page*

TABLE OF AUTHORITIES, (continued)

Cases, (continued) *Page*

TABLE OF AUTHORITIES, (continued)

Statutes *Page*

Other Authorities

Miscellaneous

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OPINIONS BELOW

On October 31, 1983, the United States District Court for the Western District of Washington (Quackenbush, J.) entered an opinion following a nonjury trial. Appendix I. An order correcting the opinion and judgment in favor of petitioners was entered December 6, 1983. App. II. The trial court's decision was published at 34 E.P.D. ¶34,347 (Commerce Clearing House, Inc.). The opinion of the Court of Appeals affirming the judgment was published at 768 F.2d 1120. App. III. An order that withdrew the opinion and ordered rehearing *en banc* was published at 787 F.2d 462. App. IV. An opinion of the *en banc* Court of Appeals was published at 810 F.2d 477. App. V. A second opinion of the original panel of the Court

of Appeals on remand from the *en banc* court was published at 827 F.2d 439. App. VI. On November 12, 1987 an order clarifying the opinion was entered. App. VIII, and a petition for rehearing denied. App. IX.[1]

JURISDICTION

Federal jurisdiction in the trial court was invoked under 28 U.S.C. § 1331. The decision of the Court of Appeals sought to be reviewed was entered on September 2, 1987. App. VI. A timely petition for rehearing was filed on September 16, 1987, App. VII, and the petition was denied on November 12, 1987. App. IX. Jurisdiction in this Court is invoked under 28 U.S.C § 1254(1). This petition is timely under 28 U.S.C § 2101(c).

PERTINENT STATUTE

Plaintiffs' claims arise under Title VII of Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a):

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment

[1] In addition, the plaintiffs took two interlocutory appeals: One unpublished opinion, affirming a denial of a motion for preliminary injunction and another affirming in part and reversing in part a dismissal of Title VII claims. 703 F.2d 329.

> opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

A. Nature of the Case.

The named plaintiffs in this class-action suit are former employees at several salmon canneries in Alaska. They brought this action against their former employers, petitioners Wards Cove Packing Company, Inc., and Castle & Cooke, Inc.[2] charging employment discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The class is defined as all nonwhites who are now, will, be, or have been at any time since March 20, 1971, employed at any one of five canneries.

Following a lengthy non-jury trial, the trial court found that plaintiffs had not established discrimination under § 1981 or Title VII and judgment was entered for petitioners. The Ninth Circuit affirmed this decision, but on rehearing *en banc* resolved a conflict within the circuit by determining that the impact analysis could be applied to subjective employment practices and remanded to the original panel. The subsequent panel decision vacated the judgment and remanded to the district court with directions to apply the disparate impact analysis in a manner inconsistent with decisions of this Court and in conflict with other circuits.

[2] Claims against Columbia Wards Fisheries, an additional defendant, were dismissed. *Atonio v. Wards Cove Packing Co., Inc.*, 703 F.2d 329 (9th Cir. 1983); *also see* App. III-13-15 and App. VIII.

B. Material Facts.

Petitioners operate salmon canneries in remote and widely separated areas of Alaska. Of eleven facilities, five were certified for this class action. The canneries operate only during the summer salmon run. For the remainder of the year they are vacant. Petitioners' head office and support facilities are located at Seattle, Washington, and Astoria, Oregon.

The employment needs to operate the canneries will vary with the size and duration of the salmon runs. Petitioners hire employees primarily from the Pacific Northwest and Alaska. The bulk of employees are "cannery workers," who work in the cannery itself on the fish processing, canning lines. Local 37 of the I.L.W.U. has jurisdiction and a contract for these jobs. The remaining jobs at the cannery are carpenters, machinists, tender crews, longshoremen, administrative, and other support personnel. It is these non-cannery worker jobs which are at issue. The non-cannery worker jobs are covered by several union contracts. Some are non-union. The trial court's opinion sets forth the facts in detail. (App. I; *see also* the background discussion in first panel opinion at App. III-3-12.)

Petitioners hire all employees except those persons working on the cannery line (cannery workers) from an external labor market which is 10% nonwhite. For the positions at issue, nonwhites filled 21% of the at-issue jobs at the class canneries and approximately 24% in petitioners' overall Alaska operations. Cannery workers, on the other hand, were hired through Local 37 of the I.L.W.U. The composition of Local 37 is dominated by Filipinoes, as are the crews it dispatches to the canneries each summer. In addition, petitioners filled some cannery worker jobs for some of the more remote canneries from local populations.

In 1974 plaintiffs commenced a class action against petitioners. The suit mounted a broad-scale attack against the

gamut of petitioners' employment practices. Plaintiffs identified 16 "practices"[3] which they contended caused an imbalance and thus a "concentration" of nonwhites in the lower-paying cannery worker jobs. Plaintiffs used comparative statistics to argue that of the total work force, the majority of the nonwhites were concentrated in the lower-paying jobs and that there should have been a balance of 50% white/nonwhite employees in all job classifications.

After 12 trial days, in which more than 100 witnesses testified, over 900 exhibits were admitted, and over 1,000 statistical tables were submitted, the trial court entered extensive findings of fact in a 73-page opinion. App. I. The findings determined that plaintiffs' comparative statistics were of little probative value; that the labor supply for petitioners' facilities is 90% white; that minorities were not underrepresented in the at-issue jobs; that cannery workers are not the appropriate comparison labor pool for at-issue jobs; that petitioners hire from an external labor supply and do not either promote-from-within or train inexperienced, unskilled workers for at-issue jobs; that most jobs at issue require skill and prior experience that is not readily acquirable at the canneries; that Local 37 provides an oversupply of nonwhite cannery workers and that this overrepresentation is an institutional factor in the industry.[4]

In addition, the trial court found that no individual instances of discrimination were proven; that petitioners did not give job preference to friends and relatives; that plaintiffs'

[3] The 16 practices were word-of-mouth recruitment, separate hiring channels, nepotism, termination of Alaska natives, rehire preference, retaliatory terminations, menial work assignments, fraternization restrictions, housing, messing, English language requirement, race labeling, subjective hiring criteria, lack of formal promotion practices, failure to post openings, and discrimination in pay in certain jobs.

[4] None of these findings were challenged on appeal.

"nepotism" statistics were distorted and unreliable; that hiring was on the basis of job-related criteria; that hiring of experienced personnel was a business necessity; that the rehire preference clauses in the union contracts operated like a seniority system; that housing is not racially segregated, and that housing, rehire, and messing policies were all dictated by business necessity.

The trial court found that plaintiffs had failed to establish intentional discrimination and the disparate impact analysis was not appropriate for application to plaintiff's wide-ranging multiple practice challenge nor to subjective hiring practices. In applying the impact analysis individually to five of petitioners' practices (rehire preference, English language, "nepotism," housing, and messing), the district court again found in favor of petitioners.

C. Court of Appeals Rulings.

On appeal a panel of the Ninth Circuit affirmed the judgment, noting, however, that there was a conflict in the decisions of several circuits and the Ninth Circuit itself as to whether the disparate impact analysis could be applied to analyze "subjective practices." 768 F.2d 1120 (9th Cir. 1985), App. III. This opinion was withdrawn after rehearing *en banc* was granted. 787 F.2d 462 (9th Cir. 1985), App. IV. On *en banc* rehearing, the Ninth Circuit held that the disparate impact analysis could be applied to such practices. 810 F.2d 477 (9th Cir. 1987), App. V. The case was then remanded to the original panel which sought to apply the impact analysis to eight of the 16 "practices" identified by plaintiffs.[5] 827 F.2d 439 (9th Cir. 1987), App. VI.

[5] The practices selected by the panel were subjective hiring criteria, word-of-mouth-recruitment, nepotism, separate hiring channels, rehire preferences, housing, messing, and labeling. The Ninth Circuit does not explain why these were selected nor what disposition was made, if any, of the other eight practices alleged to have caused the "imbalance" in hiring.

On remand the Court of Appeals panel affirmed the district court on the rehire preference, did not discuss the English language requirement, but held that plaintiffs' "comparative statistics," which showed only a concentration of minorities in the cannery worker jobs, were nonetheless adequate to require the district court to examine petitioners' hiring practices on grounds of business necessity. In doing so, the Court of Appeals did not hold that any practice caused disparate impact,[6] and ignored the district court's findings that plaintiffs' statistics were distorted and unreliable, that petitioners hired more nonwhites than the proportion available in the labor supply, and that institutional factors, not the petitioners' practice, caused an overrepresentation of minorities in cannery worker jobs.

The court also held, contrary to trial court findings, that a preference for relatives ("nepotism") existed and had an adverse impact on nonwhites. Finally, the court questioned the district court's finding of business necessity for petitioners' housing and messing practices. The Court of Appeals vacated judgment for petitioners and remanded.

[6] The Ninth Circuit implied that petitioners "conceded" causation and did not argue no impact was shown. 827 F.2d at 446, 447. This is not true. Proof of causation and impact is plaintiffs' burden and petitioners have maintained throughout that plaintiffs failed to meet their burden on both.

REASONS FOR GRANTING THE PETITION

This case raises fundamental questions as to the boundaries of the disparate impact theory under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, and as to the role of statistics and the allocation of proof under that theory. The Ninth Circuit's decision, in direct conflict with several other circuits, effectively allows a plaintiff to shift the burden of proof to an employer by establishing only that the employer's work force has an uneven racial balance. To reach this extraordinary conclusion, the Court of Appeals had to disregard established precedent of this Court and other circuits, invent new rules for allocation of proof, and totally ignore the trial court's key findings of fact and the petitioners' evidence.

This petition should be granted because only this court can answer the questions raised, resolve the conflicts created, and rectify the wrong that has been done to petitioners.

I. The Simplistic Notion That Racial Imbalance Can Establish Disparate Impact in the Face of Findings That Minorities Are Not Underrepresented in the Jobs at Issue is Not Supported By the Decisions of This Court and is Rejected by Several Other Circuits; is a Fundamental Misconception of the Role of Statistics in Proving Discrimination; Has Far-Reaching, Ominous Implications for Employers; and Is Out of Step With the Congressional Policy of Title VII of the Civil Rights Act of 1964.

The Ninth Circuit gave plaintiffs' comparative internal work force statistics decisive weight in vacating the trial court's judgment for the employers. *Id.*, 827 F.2d at 444-447 (App. VI, pp. 14-18). However, in doing so the Court of Appeals ignored the admonition of this court that the usefulness of statistics "depends on all of the surrounding facts and other circumstances." *Teamsters v. United States*, 431 U.S. 324, 340 (1977). It also ignored the unchallenged findings of the trial court on the labor market.

In failing to recognize the significance of the findings, particularly as to the labor market, the Ninth Circuit committed serious error. The decision is in direct conflict with *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977) and *Johnson v. Transp. Agency*, 480 U.S.____, 94 L. Ed. 2d 615 (1987), which hold that where at issue jobs are filled from outside the employer's own work force, it is appropriate to focus on the racial composition of the relevant external labor market and statistically compare it to the employer's actual hiring.[7] The post-*Hazelwood* circuit court opinions agree. *E.g.*, *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 425 (5th Cir. 1980); *Rivera v. City of Wichita Falls*, 665 F.2d 531, 544-45 (5th Cir. 1982); *De Medina v. Reinhardt*, 686 F.2d 997, 1004-1009 (D.C. Cir. 1982); *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 658-62 (4th Cir. 1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984). *See Hilton v. Wyman-Gordon Co.*, 624 F.2d 379, 380 (1st Cir. 1980) (plaintiff's "concentration" evidence rebutted by outside labor force statistics); *Clark v. Chrysler Corp.*, 673 F.2d 921 (7th Cir. 1982) (any showing of impact refuted by external labor market statistics). *Cf. Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987) (improper to adopt affirmative action plan where minorities not underrepresented in comparison to area labor force). The Ninth Circuit did not mention, discuss, or heed these decisions.

In effect, what the Ninth Circuit has done is hold that a mere internal work force showing of "concentration" of minorities, without regard to the factual circumstances, is sufficient to establish the disparate impact of the amalgam of practices plaintiffs choose to name. This is a direct conflict

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[7] At trial both parties recognized that establishment of the most reasonable proxy for the pool of potential applicants was necessary. *Hazelwood v. United States*, 433 U.S. 200 (1977). Both offered expert and statistical evidence on the labor market and the trial court found petitioners' evidence more probative.

with at least four other circuits whose post-*Hazelwood* decisions hold (1) internal work force comparisions are relevant, if at all, only in a promotion case or where the employer trains its workers for promotion and then, only if plaintiff focuses on the *qualified* segment of the promotion pool, *Johnson v. Uncle Ben's, Inc., supra*, 628 F.2d at 425 (5th Cir.); *Ste. Marie v. Eastern R. Assoc.*, 650 F.2d 395, 400 (2d Cir. 1981); *EEOC v. Federal Reserve Bank of Richmond, supra*, 698 F.2d at 659-60 (4th Cir.); *Rivera, supra*, 665 F.2d at 541, n.16 (5th Cir.); and (2) that a showing of concentration in a hiring case will be refuted by external labor market evidence that shows no underrepresentation of minorities, *Hilton, supra*, 624 F.2d at 380; *Coser v. Moore*, 739 F.2d 746, 752 (2d Cir. 1984); *EEOC v. Federal Reserve Bank of Richmond, supra*, 698 F.2d at 658-62 (4th Cir.); *Rivera, supra*, 665 F.2d at 539, 544-45 (5th Cir.). *See Clark, supra*, 673 F.2d at 929 (external labor market data showed no impact in hiring).

The foregoing decisions stand for the proposition that plaintiffs cannot establish a disparate impact in hiring for jobs at issue with statistical evidence that shows only a concentration of minorities in jobs not at issue, where the employer has hired minorities in their porportion to the labor market and hires from an external, not internal, labor pool. The Ninth Circuit disagrees, but it stands alone in that disagreement.

The Ninth Circuit is geographically the largest court of appeals circuit in America. To allow this fundamentally erroneous view of the role of statistical proof exposes every employer in the West that does not have an "even" racial balance in all of its jobs to the threat of litigation and the risk of liability, regardless of the particular circumstances of their businesses. As discussed below, this is not what Congress intended nor do the logical implications of this decision carry out the spirit or the letter of Title VII. *See* III, *infra*.

II. The Ninth Circuit's Application of the Disparate Impact Theory Represents a Radical Departure from Established Precedent of This Court, and Threatens to Revolutionize the Allocation of Proof in Discrimination Suits.

A. In Reaching for a Basis to Vacate the District Court's Judgment, the Ninth Circuit Has Ignored Prior Precedent of This Court and the Trial Court's Findings.

First, as pointed out above, the Ninth Circuit did not consider the trial court's finding as to the probative value of petitioners' statistical evidence. This was a finding of fact, was not clearly erroneous, and should not have been ignored. *Anderson v. Bessemer City*, 470 U.S. 564 (1985). The Ninth Circuit could not have reached its decision without avoiding this finding and in doing so, it violated the first principle of appellate decision-making.

Second, it is clear that before the burden is shifted to the employer in an impact case to prove job relatedness or business necessity, the court must evaluate both petitioners' attacks on plaintiffs' evidence and *petitioners' own rebuttal evidence*. *Dothard v. Rawlinson*, 433 U.S. 321, 338 (1977) (Rehnquist, J., concurring); *EEOC v. American Nat'l Bank*, 652 F.2d 1176, 1189 (4th Cir. 1981); *Pouncy v. Prudential Ins. Co.*, 668 F.2d 795, 800-801, n.8 (5th Cir. 1982); *Shidaker v. Carlin*, 782 F.2d 746, 750 (7th Cir. 1986). *See* B. Schlei & P. Grossman, *Employment Discrimination Law*, pp. 1325-26 (2d ed. 1983); p. 159, n.75 (suppl. 1984). The Ninth Circuit did not take into account, discuss, or even mention petitioners' labor market evidence, statistical proof, or other evidence showing that the factual setting rendered plaintiffs' comparative statistics virtually irrelevant.

Plaintiffs allege that petitioners utilized a practice of "nepotism" in filling job openings. This term is defined as "favoritism shown to . . . relatives as by giving them positions because of their relationship rather than on their merits." *Webster's Third New International Dictionary of the English Language Unabridged*, p. 1518. The trial court found that although relatives were hired, they were *not* hired because of that relationship, they were hired because they were skilled and qualified. App. I-105-122. The district court found that *no preference for relatives existed.* In other words, nepotism was not established. Despite accepting the trial court's findings (*see* App. VI-20-21), the Ninth Circuit found that the practice of nepotism existed. 827 F.2d at 445. Moreover, the Ninth Circuit found that there were 349 "nepotistic hires" during 1970-1975. *Id.*[8] The statistics come from tables prepared by plaintiffs that simply listed employees who were related. These tables were rejected by the trial court. App. I-105.[9] Plaintiffs attempted to prove that the fact relatives were hired demonstrated they were hired *because* they were relatives. The trial court found otherwise. This finding was not clearly erroneous.

Finally, as to housing and messing practices, the trial court found that even if it applied the impact analysis, the practices were justified by business necessity. This finding was not clearly erroneous and should not have been vacated by the Ninth Circuit under the rule of *Anderson v. Bessemer City, supra.*

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[8] The Ninth Circuit panel's finding is even more curious when one recalls that this same panel had previously found that nepotism did *not* exist. *See* 768 F.2d at 1126, 1133 (App. III-22-23, 56).

[9] There were numerous methodological problems with plaintiffs' so-called "nepotism tables." A principal flaw was that they included gross over-counting of employees and improperly treated some persons as related.

B. The Ninth Circuit Decision is a Revolutionary Departure from the Established Rules for the Allocation of Proof in a Discrimination Case.

1. New Allocation of Proof.

The Ninth Circuit has invented a wholly unprecedented rule for cases that are tried under both the treatment and impact analysis. The Ninth Circuit held that since petitioners had, in their rebuttal to plaintiffs' treatment case, offered to "explain the disparity,"[10] they were *precluded* from challenging plaintiffs' *impact* showing. App. VI-5. There is absolutely no Supreme Court precedent supporting this holding. The only decision cited by the Ninth Circuit is *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). *Albemarle* held that if the plaintiff has *established* disparate impact of an employment test, the employer must prove the job relatedness of that test. It did *not* hold that the employer was precluded from showing that there was no impact; nor did it hold that the employer was precluded from attacking *plaintiffs'* evidence purporting to show impact.

In effect, what the Ninth Circuit has done with this new "rule" is to avoid the clear burden of proof requirements in a treatment case set forth by this court in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and followed by the majority of other circuits thereafter.[11] *Burdine* holds that once a plaintiff has established a *prima facie* treatment case, the employer may defend by articulating — not

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[10] By attacking plaintiffs' statistics and by establishing the proper labor market, petitioners proved no disparity existed. In addition, petitioners articulated nondiscriminatory reasons for their conduct.

[11] *E.g., St. Marie v. Eastern R. Ass'n*, 650 F.2d 395 (2d Cir. 1981); *McNeil v. McDonough*, 648 F.2d 178 (3d Cir. 1981); *Robins v. White-Wilson Medical Clinic*, 642 F.2d 153 (5th Cir. 1981). *But see Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. den. sub nom. Meese v. Segar*, 471 U.S. 1115 (1985) and *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985).

proving — a legitimate nondiscriminatory reason for his action. 450 U.S. at 258.[12] The Ninth Circuit seems to hold that once the reason is articulated the employer may no longer attack plaintiffs' statistics and prove lack of disparate impact; further, the employer must now not only articulate, he must prove the business necessity of the reason. The result of this new rule is to emasculate *Burdine* and make it impossible for an employer to defend a treatment case by articulating a reason for his action, unless he is prepared to prove the business necessity of the practice.

Combined with its holding that the proof necessary to establish a *prima facie* case under the treatment and impact theories is identical[13] (App. VI-4-5), the Ninth Circuit has effectively held that burden of proof is shifted to the employer if plaintiffs meet the "not onerous" burden[14] of establishing a *prima facie* treatment case.

A case cited that could support the Ninth Circuit's holding on the burden of proof is *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied sub nom, Meese v. Segar*, 471 U.S. 1115 (1985). *Segar* also involved a disparate treatment attack on the cumulative effect of many alleged practices. The District of Columbia Circuit held that if an employer defends by articulating the reason for his conduct, *he* must identify which of the practices causes the disparity and then prove the business necessity of the practice.[15] *Segar* was followed by the Eleventh

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[12] While the Ninth Circuit paid lip service to this requirement, it simply avoided it by equating "articulation" in a treatment case with an admission of impact and of causation in an impact case.

[13] A holding that has little or no support and conflicts with *Robinson v. Polaroid*, 732 F.2d 1010 (1st Cir. 1984) (plaintiff established *prima facie* treatment case but not impact case).

[14] *Burdine, supra*, 450 U.S. at 253.

[15] In *Segar*, the employer explained his conduct, as is allowed by *Burdine*, but did not refute the statistical disparity. Here,

(footnote continued on next page)

Circuit in *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985). No other circuits appear to have deviated from *Burdine*.

2. *Hiring Criteria.*

In applying the impact theory to hiring criteria, the Ninth Circuit also altered the burdens of proof and ignored the district court's findings. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) requires that if the plaintiff wishes to challenge a hiring criterion as having a disparate impact, he must prove that *criterion* causes the impact. In *Griggs*, plaintiffs established the disparate impact of a high school diploma requirement with unrebutted evidence that a disproportionately smaller percentage of blacks had diplomas. 401 U.S. at 430, n.6. In *Dothard, supra*, plaintiff's established the disparate impact of a height and weight requirement by showing that a disproportionate number of women were less than 5'2" feet tall and 120 lbs. 433 U.S. at 429-30. In neither case would the plaintiffs have been allowed to establish an impact case by simply *alleging* the practice was discriminatory without independent evidence that the qualification *had* an impact.

Yet, this is precisely what the Ninth Circuit has done here. It held that since plaintiffs "challenged" petitioners' hiring criteria, they were *not* required to take those criteria into account. App. VI-17, 27. Plaintiffs chose not to do so,[16] both in their labor market statistics and in their internal compara-

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defendant did both: explained the facts that rebutted plaintiffs' *prima facie* showing (*e.g.*, that defendants hired from an external, not internal, labor pool; that Local 37 dispatched a gross overrepresentation of nonwhites), attacked the reliability of plaintiffs' statistics, and offered their *own* statistics that showed nonwhites were not underrepresented in the at-issue jobs.

[16] Plaintiffs chose instead to rely on their argument that virtually all of the at-issue jobs did not require prior skills, experience, or other qualifications. The trial court found otherwise and plaintiffs offered no evidence that took the trial court's findings into account.

tive statistics. They did so at their peril, because the trial court *did* find that employers hired on the basis of job-related criteria. App. I-45-75, 122.

It is not surprising that plaintiffs chose not to account for even the most basic qualifications of the "proxy" population. *Petitioners'* did so with their labor market analysis and it established that qualified nonwhite availability was closer to 10% than to the 50% argued by plaintiffs.

In its discussion of hiring criteria, the Ninth Circuit stated that it was *petitioners'* burden to prove the qualified nonwhite component in the labor market (App. VI-17, 26), but then ignored petitioners' evidence doing just that. Instead of addressing petitioners' evidence that showed not only the qualified nonwhite component in the labor market, but that nonwhites were not underrepresented in the at-issue jobs, the Ninth Circuit skipped over this evidence and held that the employers were first required to *prove job relatedness* of the criteria plaintiffs were challenging. Again, this is a totally inappropriate shifting of the burden of proof. Combined with its inappropriate crediting of plaintiffs' statistics, this means that a plaintiff can simply allege that there is an "imbalance" between two job categories (*i.e.*, something other than 50/50), "allege" that any qualifications required by the employer are discriminatory, and thereby force on the employer the burden of proving the job relatedness of its criteria without plaintiff ever having to make the threshold showing of impact of the qualification at issue.

3. Sources of Employees.

The Ninth Circuit's allocation of the burden of proof in its treatment of the "hiring channels" and the word-of-mouth recruitment issues is particularly disturbing in light of the actual facts in this case. The Court of Appeals seems to conclude that plaintiffs' comparative statistics combined with

word-of-mouth recruiting[17] was "discriminatory." App. VI-28-29. No court has held that word-of-mouth recruiting is *per se* discriminatory; the court must look first at the results of that practice. *See Markey v. Tenneco*, 707 F.2d 172 (5th Cir. 1983) and *Clark v. Chrysler Corp.*, 673 F.2d 921 (7th Cir. 1982), both of which hold that the employer can defeat an attack on word-of-mouth recruiting by establishing that the resultant hiring is in line with the external labor market. Even the *Ironworkers Local 86* case cited by the Ninth Circuit[18] did not conclude that plaintiffs had established their case without examination of the *unrebutted* stark racial statistics and the evidence as to racial composition of the local population. The Ninth Circuit did not do so here. To reach its conclusion on these practices, the Ninth Circuit not only ignored the trial court's findings, it committed plain error in concluding that the companies *did not argue* the practices had "no impact." App. VI-30. (This error was pointed out in the Petition for Rehearing, App. VII.)

The Ninth Circuit then placed the burden of proof on the *petitioners* to establish why they *did not* hire for the at-issue jobs through different sources. App. VI-30.[19] In forcing

[17] Word-of-mouth recruiting, the practice selected by the Ninth Circuit for consideration, was only one method by which potential employees came to the attention of management. For instance, the record also demonstrates that walk-in applicants and referrals from other unions having jurisdiction over the at-issue jobs were used. The trial court found that the company got far more applications than there were available non-cannery worker jobs.

[18] *United States v. Ironworkers Local 86*, 443 F.2d 544, 548 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971) cited at App. VI-29.

[19] It appears that the Ninth Circuit has concluded, in the absence of evidence that minorities are underutilized in the at-issue jobs, that the employers *should* have hired carpenters, machinists, bookkeepers, etc., through Local 37 or done what the trial court held was *unreasonable*, that is, recruit for skilled personnel in the thousands of square miles of tundra in Western Alaska in the dead of winter.

petitioners to establish why they did not utilize the cannery worker crews as sources for at-issue jobs (i.e., promote from within), hire machinists through Local 37, or recruit for skilled jobs in remote regions of Alaska, the Ninth Circuit is doing nothing less than substituting its judgment for that of the employer as to the best way to operate its business. This is a flat violation of the admonitions of this court in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-78 (1978) and reiterated in *Burdine, supra*, 450 U.S. at 259.

Where the employer has not underutilized minorities in the at-issue jobs, it is inappropriate to adopt a voluntary affirmative action plan to boost the number of minorities in those jobs. *Johnson v. Transportation Agency*, 480 U.S.____, 94 L. Ed. 2d 615 (1987). Yet, in that very situation here, the Ninth Circuit is demanding that petitioners prove why they have *not* taken the different and "affirmative" steps of utilizing different sources for employees. The underlying assumption is that these steps would "maximize the number of minority workers" hired. Again, this violates the principle of *Furnco* and *Burdine*.[20]

III. Allowing Plaintiffs to Challenge an Entire Range of "Named" Employment Practices Merely Because the Employers' Work Force Reflects Uneven Racial Balance Is an Improper Application of the Disparate Impact Model, Places an Unfair Burden on the Employer, and Exacerbates an Existing Conflict of Authority in the Circuits.

The only showing plaintiffs made in support of their impact theory attack on petitioners' hiring practice was the

[20] It is worth noting that if petitioners here would be prohibited under *Johnson v. Transportation Agency* from adopting an affirmative action plan for minorities in the at-issue jobs, it can hardly be said that minorities have established a *prima facie* case of disparate impact against them. *See Johnson v. Transportation Agency, supra*, 94 L. Ed. 615, 631 and n.10.

allegation that the cumulative effect of the practices identified was the concentration of minorities in the cannery worker jobs. This was shown by their comparative statistics. With but two exceptions,[21] they offered no other statistical evidence that even purported to show the impact of any one of the *sixteen* hiring practices they named, independent of the others. This is exactly what the plaintiff did in *Pouncy v. Prudential Ins. Co.*, 668 F.2d 795 (5th Cir. 1982); but unlike the Ninth Circuit here, the Fifth Circuit refused to allow plaintiff to misuse the impact theory in this way. 668 F.2d at 800-802.[22] The First Circuit agrees with the Fifth Circuit on this issue. *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1014, 1016 (1st Cir. 1984). The Ninth Circuit has now joined the Eleventh Circuit, *Griffin v. Carlin*, 755 F.2d 1516, 1522-1525 (11th Cir. 1985), in conflict with the Fifth and First Circuits. This Court should resolve the conflict.

It is an important conflict to resolve. First, it is and will be a recurring problem. Many businesses have, for completely legitimate reasons, a concentration of a protected group in a particular job category. *See, e.g., Ste. Marie, supra*, 650 F.2d at 401-402; *Hilton v. Wyman-Gordon, supra*, 624 F.2d at 380; *Rivera, supra*, 665 F.2d at 539-542. Employers need to know whether the imbalance will force them, like petitioners here, to prove the business necessity of every practice a plaintiff chooses simply because plaintiff alleges they "combined" to "cause" that imbalance or concentration.

[21] Housing space charts and tables of relatives. The latter, along with plaintiffs' labor market statistics, were rejected.

[22] The Ninth Circuit unpersuasively tried to distinguish the facts in *Atonio* from *Pouncy* by saying that plaintiffs in *Atonio* "identified" (*i.e.*, named) the practices. 810 F.2d at 1486, n.6. The plaintiff in *Pouncy* did the same thing. *See* 668 F.2d at 801 (names three practices).

An obvious solution for an employer is to eliminate the imbalance as economically as possible. To the extent an *overrepresentation* of minorities produced the imbalance (*e.g.*, *Hilton*, *supra*, 624 F.2d 379), many employers will simply *reduce* the number of minority workers until overrepresentation disappears. If the petitioners here had adopted this "solution," *e.g.*, by refusing to cooperate with Local 37 unless it dispatched only 10% nonwhites, plaintiffs would not have a case.

For the employer who cannot (or will not) reduce its minority work force in lower-paying jobs, one solution is to use an in-house defacto racial quota in the upper jobs until the percentage of minorities in the two categories is the same. This is directly contrary to the spirit and intent of Title VII. *See* 42 U.S.C. § 2000e-2(j) (Title VII does not require preferences or quotas because there is a racial imbalance). It also risks liability in reverse discrimination suits — particularly where there was no underutilization in the upper jobs. *See Hammon*, *supra*, 826 F.2d 73 (D.C. Cir. 1987) (voluntary affirmative action plan set aside because no underutilization shown).

Second, the impact model was designed to focus on a particular requirement, usually a selection criterion, that can be measurably shown to cause an adverse impact, *e.g.*, *Pouncy*, *supra*, 668 F.2d at 801; *see* discussion, *infra*, IV. Most of the practices that plaintiffs here allege combined to cause the imbalance (*e.g.*, requiring cannery workers to cut the grass; restrictions on fraternization; failure to post) are far from this conception and can be, at best, only tangentially connected to the reasons minorities are overrepresented in the cannery worker jobs. Indeed, plaintiffs did not offer proof designed to show the impact of any one, independent of the others.

This leads to a third and very important reason this conflict should be resolved in favor of petitioners: The more practices plaintiffs can "name" or "identify" as allegedly

causing the concentration, the more impossible becomes the employers' burden. For if the court finds that imbalance is sufficient to require the employer to prove business necessity, he could be forced to justify *every* practice identified. Courts may require "validation" under the EEOC Guidelines for Employee Selection Procedures — an enormously expensive proposition for *one* "procedure," but prohibitive for several.

The unfair risk and burden the employer faces is best illustrated by petitioners' situation: they have demonstrated to the satisfaction of district court and the Court of Appeals the business necessity of their rehire preference, an English language requirement, and (although the Ninth Circuit would disagree) of their hiring criteria. But they are *still* in court — because plaintiff named *other* practices that the Ninth Circuit says must *also* be justified, even though plaintiffs have not offered any evidence establishing that these *remaining* practices "caused" the imbalance, as opposed to the ones already proven to be a business necessity. This is exactly the situation the Fifth Circuit predicted in *Pouncy* would occur: allowing "disparate impact of one element to require validation of other elements having no adverse effects." 668 F.2d at 801.

IV. There is a Substantial Conflict in the Circuits as to Whether the Disparate Impact Analysis May Be Applied to Subjective Decision Making and Other Practices That Do Not Act as "Automatic Disqualifiers."[23]

The Ninth Circuit has now erroneously followed the Sixth, Tenth, Eleventh, and the District of Columbia Circuits in applying the impact analysis to subjective practices and criteria. *Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88 (6th Cir. 1982); *Hawkins v. Bounds*, 752 F.2d 500 (10th Cir. 1985); *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985); *Segar v. Smith*,

[23] *See Dothard v. Rawlinson*, *supra*, 433 U.S. at 338 (Rehnquist, J., concurring).

738 F.2d 1249 (D.C. Cir. 1984), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985). The Fourth, Fifth, Seventh, and Eighth Circuits do not apply the impact analysis to subjective practices, although there are some conflicts within some of those circuits. *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633 (4th Cir. 1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984); *Pope v. City of Hickory*, 679 F.2d 20 (4th Cir. 1982); *Bunch v. Bullard*, 795 F.2d 384 (5th Cir. 1986); *Vuyanich v. Republic Nat'l Bank of Dallas*, 723 F.2d 1195 (5th Cir. 1984), *cert. denied*, 469 U.S. 1073 (1984); *Pegues v. Mississippi State Employment Serv.*, 699 F.2d 760 (5th Cir.), *cert. denied*, 464 U.S. 991 (1983); *Pouncy v. Prudential Ins.*, 668 F.2d 795 (5th Cir. 1982); *Griffin v. Board of Regents*, 795 F.2d 1281 (7th Cir. 1986); *Harris v. Ford Motor Co.*, 651 F.2d 609 (8th Cir. 1981).

This Court has presently granted certiorari and heard argument (January 21, 1988) in *Watson v. Fort Worth Bank & Trust*, 798 F.2d 791 (5th Cir. 1986), to review this important question. No. 86-6139.

This case illustrates a broader application of the issue than *Watson*, inasmuch as it poses several applications of the analysis, *e.g.*, word-of-mouth recruitment, "separate hiring channels," labeling, and the effect of challenges to the cumulative effect of multiple practices.

The decision in *Watson* may reach some of the issues raised by petitioners. While this Court may wish to consider ruling on this petition after that decision is issued, this case presents other important issues and the granting of the writ should not be delayed.

CONCLUSION

Although they mounted a broad scale attack, plaintiffs were unable to prove any instance of individual or of class-wide disparate treatment of minorities in any aspect of the

employment relationship. Plaintiffs' fallback position was to allege under the disparate impact theory that petitioners' practices combined to cause unintentional discrimination. Without significant evidence of unfair treatment, plaintiffs were left to prove their impact case with comparative statistics. These statistics did nothing more than show "imbalance" — that there was an overabundance of minority workers in the cannery worker jobs. They proved nothing as to the *jobs at issue*. Plaintiffs' statistics were a simplistic reflection of the fact that Local 37 dispatched an oversupply of minority workers. In other words, but for the fact these petitioners fulfilled their collective bargaining responsibilities with Local 37, plaintiffs would not have an impact case.

The trial court saw through plaintiffs' theory; the Ninth Circuit did not. To justify its decision, however, the Ninth Circuit issued an opinion that has ominous implications not only for petitioners, but for litigation of all discrimination cases and for the conduct of everyday business.

This case presents a meaningful opportunity for this Court not only to correct an erroneous decision, but to finally establish the proper boundaries of the impact analysis, to clarify the role of statistics and the proper allocation of the burdens of proof in applying that analysis, and to resolve numerous and longstanding circuit conflicts in this important area of law.

For the foregoing reasons, this petition should be granted.

Respectfully submitted.

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

FRANK ATONIO, et al.,	)	
Plaintiffs,	)	NO. C-74-145-JLQ
vs.	)	
WARDS COVE PACKING COMPANY, INC., et al.,	)	OPINION FOLLOWING NONJURY TRIAL
Defendants.	)	

This class action challenges various employment practices of three Alaska salmon canning companies under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq. (1970 ed. and Supp. V), and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970 ed.). Early during the pendency of this lengthy action, the Title VII claims against two

of the defendant companies, Ward Cove Packing Company and Columbia Wards Fisheries were dismissed. Since then, the Ninth Circuit, in an amended decision, reinstated the Title VII claims against Ward Cove Packing Company. Atonio, et al. v. Ward Cove Packing Co., et al., Slip Op. No. 81-3181 (Oct. 21, 1982) (unpublished Order Amending Atonio, et al. v. Ward Cove Packing Co, et al, 703 F.2d 329 (9th Cir. 1982)). Plaintiffs are present and former employees alleging defendants discriminate on the basis of race in hiring, firing, paying, promoting, housing and messing at the canneries.

The class certified is all nonwhites who are, will be, or have been since March 20, 1974, employed by defendants Ward Cove Packing Company (WCP), Bumble Bee Seafoods division of Castle & Cooke, Inc. (BBS), or by Columbia Wards

Fisheries (CWF) at its Alitak or Ekuk cannery facilities. See Amended Certification Order of Chief Judge Walter T. McGovern at Ct. Rec. 138.

After a lengthy nonjury trial this court makes these

FINDINGS OF FACT

1. Plaintiff Frank Atonio is of Samoan descent. Plaintiffs Alan Lew and Curtis Lew are of Chinese descent. Plaintiffs Eugene Baclig, Joaquin Arruiza and Randy del Fierro are of Filipino descent. Plaintiff Gene Allen Viernes was of Filipino descent. He died on June 1, 1981. Barbara Viernes, his personal representative, was substituted as a plaintiff for him. Plaintiffs Clarke Kido and Lester Kuramoto are of Japanese descent. Robert Morris is of Japanese and Native American descent. All plaintiffs except Frank Atonio are United States citizens.

2. Defendant WCP is an Alaska corporation. It has had over twenty-five (25) employees for each working day in at least twenty (20) weeks of each year from 1970 onward. It has been engaged in an industry affecting commerce at least since 1970.

3. Defendant Castle & Cooke, Inc. (BBS) is a Hawaii corporation, of which Bumble Bee Seafoods is a division. It has had over twenty-five (25) employees for each working day in at least twenty (20) weeks of each year from 1970 onward. It has been engaged in an industry affecting commerce at least since 1970.

4. Defendant CWF is a joint venture. It has had over twenty-five (25) employees for each working day in at least twenty (20) weeks of each year from 1970 onward. It has been engaged in an industry affecting commerce at least since 1970.

5. The joint venturers or operators of defendant CWF are defendants WCP and BBS. At least since 1970, WCP and BBS have operated the venture jointly and equally.

6. In operating the CWF joint venture, WCP and BBS have each acted as the agent of CWF.

7. At least since 1970, WCP has owned and operated two (2) Alaska salmon canneries: Red Salmon Cannery and Wards Cove Cannery.

8. At least since 1970, BBS has owned and operated one Alaska Salmon Cannery: Bumble Bee Cannery.

9. AT least since 1970, WCP and BBS have operated five (5) Alaska salmon canneries as part of the CWF joint venture: Alitak cannery and Ekuk cannery; Kenai cannery; Port Baily cannery; and Icy Cape cannery. They have also jointly and equally operated four

(4) Alaska fish camps as part of the venture: Egegik, Craig, Chignik Lagoon and Moser Bay, Alaska. The canneries having practices at issue in this case are Bumble Bee (at South Nahnek on Bristol Bay), Red Salmon (at Nahnek on Bristol Bay), Wards Cove (at Ketchikan in southeast Alaksa), Ekuk (on the Nashugak River in Bristol Bay), and Alitak (on Kodiak Island).

10. The CWF facilities are owned by CWC Fisheries, Inc. It is a dormant corporation. Its only function is ownership of those facilities. Defendant WCP and BBS each own 50% of CWC Fisheries, Inc. The managers of CWF are the president and vice president of CWC Fisheries, Inc. The remaining officers and the directors of CWC Fisheries, Inc., are officers of WCP and BBS.

11. At least since 1970, WCP and BBS have each owned 50% of Lake Union

Terminals, Inc. Lake Union Terminals, Inc., owns a boat yard in Seattle, Washington which is known as LUT Yard. LUT Yard is a division of defendant CWF, which services assets such as tenders and fishing boats owned by CWC Fisheries, Inc., and WCP. CWC Fisheries, Inc., owns the defendant CWF tenders.

12. Plaintiff Arruiza was employed by defendant BBS during the 1971-73 salmon canning seasons.

13. Plaintiffs Kido and Karamoto were employed by defendant BBS during the 1971 salmon canning season. They were also employed by defendant WCP during the 1970 and 1972-73 salmon canning seasons.

14. Plaintiff Viernes was employed by WCP during the 1969-73 salmon canning seasons.

15. Plaintiffs Alan Lew and Curtis Lew were employed by WCP during the 1972-73 salmon canning seasons.

16. Plaintiff Frank Atonio was employed by WCP during the 1972-75 salmon canning seasons. He was also employed by defendant CWF during the 1980 season.

17. Plaintiff Randy del Fierro was employed by WCP during the 1970 and 1972-73 salmon canning seasons. He was also employed by defendant CWF during the 1971 season.

18. Plaintiff Robert Morris was employed by WCP during the 1973 season.

19. Plaintiff Eugene Baclig was employed by WCP during the 1969-73 seasons.

20. No representative plaintiff has worked at the CWF cannery at Ekuk.

21. On October 31, 1973 plaintiffs Frank Atonio, Lester Kuramoto, Clarke Kido and Eugene Baclig filed with the Equal Employment Opportunity Commission ("EEOC") the charges marked Exhibits 1-4. On November 16, 1973 plaintiffs Randy del

Fierro and Joaquin Arruiza filed with the EEOC the charges marked Exhibits 5-6. On January 2, 1974 plaintiffs Alan Lew and Curtis Lew filed with the EEOC the charges marked Exhibits 7-8. On January 31, 1974 Robert Morris filed with the EEOC the charge marked Exhibit 9. On February 14, 1974 plaintiff Gene Allen Viernes filed with the EEOC the charge marked Exhibit 10.

22. On November 13, 1973 the EEOC deferred the Atonio, Kuramoto, Kido, Arruiza and del Fierro charges to the Washington State Human Rights Commission. On January 23, 1974 the EEOC assumed jurisdiction over these charges. The EEOC served the statutory notices of the charges.

23. On January 9, 1974 the EEOC deferred the Lew charges to the Washington State Human Rights Commission. On January 18, 1974 the EEOC assumed

jurisdiction over these charges. The EEOC served the statutory notice of the charges.

24. On February 1, 1974, the EEOC deferred the Morris charge to the Washington State Human Rights Commission. On March 7, 1974 the EEOC assumed jurisdiction ovr the charge. The EEOC served the statutory notice of the charge.

25. On March 4, 1974 the EEOC deferred the Viernes charge to the Washington State Human Rights Commission. On May 6, 1974 the EEOC assumed jurisdiction over the charge. The EEOC served the statutory notice of the charge.

26. On March 13, 1974 the EEOC deferred the Viernes charge to the Washington State Human Rights Commission. On May 13, 1975 the EEOC assumed jurisdiction over the charge. The EEOC

served the statutory notice of the charge.

27. On March 11-12, 1974, the EEOC mailed plaintiffs Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Frank Atonio, Joaquin Arruiza and Randy del Fierro--as well as Robert Morris--the letter and right-to-sue notices marked Exhibits 11-18, 20-27. This action was filed within 90 days of receipt of those notices.

28. On May 24, 1974 the EEOC mailed plaintiff Baclig the letter and right-to-sue notice marked Exhibits 19 and 28.

29. On July 18, 1974 the EEOC mailed plaintiffs Alan Lew and Lester Kuramoto filed with the EEOC the originals of Exhibits 29-30. On August 5, 1974 plaintiff Eugene Baclig filed with the EEOC the original of Exhibit 31. On August 5, 1974 plaintiff Curtis Lew and Robert Morris filed with

the EEOC the originals of Exhibits 32-33. On August 21, 1974 plaintiff Clarke Kido filed with the EEOC the original of Exhibit 34. On September 24, 1974 plaintiffs Frank Atonio and Gene Allen Viernes filed with the EEOC the originals of Exhibits 35 and 37. In mid-October, 1974 plaintiff Randy del Fierro filed with the EEOC the original of Exhibit 527.

30. On November 13, 1974, the EEOC mailed plaintiffs Alan Lew, Curtis Lew, Eugene Baclig, Clarke Kido, Gene Allen Viernes, Frank Atonio and Lester Kuramoto--as well as Gene Allen Viernes and Robert Morris--the originals of Exhibits 38-53.

31. On June 27, 1972, Commissioner's charges were filed with the EEOC against WCP. They are marked Exhibits 54-55.

32. In February 1974 the EEOC entered into a conciliation agreement with defendants WCP and CWF based on the Commissioner's charge.

33. No plaintiff or member of the aggrieved classes described in the Commissioner's charges marked Exhibits 54-55 was a party to the conciliation agreement settling those charges.

34. The EEOC has not filed a civil action against either defendant WCP or defendant CWF on the basis of the Commissioner's charges.

35. On March 27, 1975 plaintiffs requested that the EEOC issue right-to-sue letters based on the Commissioner's charge against defendant Wards Cove Packing Company, Inc.

36. On April 15, 1975 the EEOC's Seattle District Office wrote plaintiffs' attorneys, declining to issue these right-to-sue letters.

37. On March 1, 1976 the EEOC's General Counsel overruled the Seattle District Office's decision not to issue right-to-sue letters based on a Commissioner's charge.

38. On March 19, 1976 the EEOC issued Frank Atonio, Eugene Baclig, Randy del Fierro, Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Robert Morris and Gene Allen Viernes a letter and right-to-sue notices based on the Commissioner's charges against Wards Cove Packing Company and Columbia Wards Fisheries. They are marked Exhibits 56-57.

39. On April 22, 1976 plaintiffs moved for an Order indicating that the court would permit them to amend their complaint so as to allege receipt of the right-to-sue notices.

40. On July 21, 1975 plaintiff Clarke Kido filed the EEOC charge marked Exhibit 58.

41. On July 25, 1975 the EEOC deferred the charge to the Washington State Human Rights Commission. On August 7, 1975 the EEOC assumed jurisdiction over the charge. The EEOC served the statutory notice of the charge.

42. On March 11, 1980 the EEOC mailed plaintiff Clarke Kido the right-to-sue notice marked Exhibit 428.

43. On May 1, 1980 plaintiffs moved to amend their complaint so as to allege receipt of the letter and right-to-sue notice.

44. On June 20, 1977 plaintiff Gene Allen Viernes filed with the EEOC the charge marked Exhibit 528, and filed with the Washington State Human Rights Commission the charge marked Exhibit 429.

45. On or prior to September 1, 1977 the EEOC assumed jurisdiction over

the charge filed with it. The EEOC served the statutory notice of the charge.

46. On August 3, 1977 plaintiff Gene Allen Viernes filed with the EEOC the charged marked Exhibit 430.

47. On August 5, 1977 the EEOC deferred the charge to the Washington State Human Rights Commission. On August 26, 1977 the EEOC assumed jurisdiction over the charge. The EEOC served statutory notice of the charge.

48. On May 31, 1978 the EEOC mailed plaintiff Viernes the right-to-sue notices marked Exhibits 431-32.

49. The defendants are engaged in the salmon processing business in various Alaska locations. Most of the processing has been done by canning although in recent years some has also been done by freezing.

50. Defendants' facilities are generally located in remote, widely

separated areas of Alaska. Thus, the canneries and fish camps are self-supporting installations where the crews are housed and fed by the company.

51. Since summer salmon runs are very short, it is essential that the canneries operate at peak production as much of the time as possible.

52. Most of the jobs at the canneries are seasonal and of short duration. Only the cannery superintendent, the assistant cannery superintendent, and certain office personnel are employed by the company on a permanent year-around basis with the exception of Ward Cove's small winter maintenance crew and certain machinists, carpenters, beachmen and tendermen who may be employed in the shipyard in the offseason. Each facility also has a winter watchman.

53. In some years, a cannery may not operate at all. Some facilities are abandoned canneries which operate as fish camps. A fish camp is a support facility for fishermen which does not process salmon by canning or freezing.

54. Wards Cove cannery canned salmon in 1970 and 1972-80, and operated as a fish camp in 1971. Red Salmon Cannery canned salmon in 1970-72 and 1977-80, and operated as a fish camp in 1973-76. Bumble Bee cannery canned salmon in 1970-73 and 1975-80, and operated as a fish camp in 1974. Ekuk cannery canned salmon in 1970-80. Alitak canned salmon in 1970-80.

55. Readying the canneries and fish camps for operations is done during May or June of each year.

56. Preseason work is intense, involving extensive overtime, and must be done in a short period of time.

57. The intense period of preseason work allows no time for training unskilled workers for skilled jobs.

58. When the cannery is open and running, the cannery workers arrive just before the start of fishing operations. If they are idle prior to canning, they are often given unskilled work as called for by their contract, such as grass cutting and cannery cleanup. The grass is cut by knives and hand sickles. Use of lawn mowers is impractical due to the length of the grass and steep hilliness of much of the terrain.

59. In addition to estimates made by the Alaksa Department of Fish and Game and the Fisheries Research Institute at the University of Washington, management makes its own estimate for each run at each facility. Accordingly, the decision is made as to how many canning lines to

operate and the number of employees to be hired.

60. Frequently, the predicted run varies considerably from the actual run, and during the season the actual catch may vary tremendously on a daily basis. Also, the Alaska Department of Fish and Game will open or close fishing by emergency order depending upon the amount of escapement.

61. All fishermen are now "independent", on their own boats and are not employees. They are paid by the pound for fish and each crew divides the profit on a share basis. Prior to 1974, "company" fishermen were paid by the fish or on a piecework basis.

62. Bristol Bay gillnet fishing boats and some seine boats on Kodiak Island are stored in the offseason in the cannery. Due to the remoteness of those locations, repairs to those fleets are

performed by such cannery employees as the caulkers, shipwrights, carpenters, and port engineers.

63. Salmon are extremely perishable and must be processed within 48 hours of capture. Most salmon is transferred from the fishing grounds to the canneries aboard "dry" or unrefrigerated tenders; refrigerated or "brine" tenders can hold fish for several days and can transfer them to other areas for processing.

64. Tenders carry equipment and supplies to the cannery location in time for use and storage well in advance of operations. During the season, the tenders will also count fish by species. In Bristol Bay, fishermen were often fed on the tenders during unloading until 1981.

65. After arrival at the cannery, the fish are conveyed to a "fish house" where the salmon are eviscerated, the

eggs pulled, and they are cleaned. In the fish house is located the salmon butchering machine. This eviscerating machine is patented under the name of "Iron Chink" machine.

66. Salmon eggs are processed under the supervision of Japanese nationals who are not employees of the defendants. The processed eggs are marketed in Japan as a specialty product known as "suyiko".

67. The canning is done under regulation of the Food and Drug Administration. The major cleanup, which is performed every 24 hours and which lasts approximately 3-1/2 to 4 hours, is mandatory. The canning lines run at a rate of 235-260 cans per minute or four cans per second.

68. After filling, the canned salmon are cooked in steam pressure retorts. The precise time/temperature requirements are established by the FDA.

failure to keep accurate records can result in FDA seizure and impoundment of all lots for which there are no records verifying that a "proper cook" was made. The cannery could be forced to recan and recook all "suspect" lots, an expensive procedure.

69. It is important that the machinists ensure that proper seals on can bottom (can shop machinist) and top (seamer machinist) are made, the side seams are secure, and that the salmon are properly cooked (salmon cook) to avoid botulism and to provide a wholesome, quality product for sale.

70. During the canning operation, various machinists are engaged in ensuring the continued smooth operation of the equipment. There are several who specialize in certain equipment; that is, the "filler man", "seamer man", "salmon cook", and "can shop" are typical of these

specialties. In case of a breakdown of the machine, an entire line will be out of production until repair is effected.

71. CWF also maintains and operates a shipyard in Seattle, Washington, under the name "Lake Union's Terminals". BBS also has a resident vice president with a small support staff at 88 East Hamlin in Seattle. The home office of its Bumble Bee Seafoods division is Astoria, Oregon where the Bumble Bee cannery superintendent and his staff is located.

72. At least since 1970 John R. Gilbert has been defendant BBS's vice president in charge of Alaska operations and one of two managers of the CWF's joint venture.

73. From at least 1970 through 1977, A.W. Brindle was president of defendant WCP and a manager of the defendant CWF joint venture. After his

death in 1977, A.W. Brindle was succeeded in these roles by Alec W. Brindle.

74. The overall management of CWF is vested in Alec W. Brindle and John R. Gilbert. They communicate directly with each operations' superintendent.

75. Exhibit 60 is the only document generally governing the terms of the defndant CWF joint venture. It was executed by defendant WCP and the predecessor of defendant BBS in the venture.

76. Employees at 88 East Hamlin, Seattle, Washington perform duties for both defendants WCP and defendant CWF regardless of which defendant's payroll they are on.

77. At least since 1970 defendant CWF has not had an independent representative at collective bargaining negotiations. Instead, it has relied on

the representative of defendants WCP and BBS.

78. At least since 1970 the president of defendant WCP has been primarily responsible for setting its hiring policies, firing policies, promotion policies and employee regulations. He has also been responsible for hiring its cannery superintendents and office managers. The vice president in charge of Alaska operations for defendant Castle & Cooke, Inc., has had similar responsibilities for that defendant's cannery. These two individuals have jointly and equally had the same responsibilities for the defendant Columbia Wards Fisheries' facilities.

79. Decisions on whether a plant will operate, the size of its crew, salaries of its non-union personnel, the basic amounts of its supplies, the

equipment it will have, whether a capital expenditure should be made and other major decisions are made jointly for CWF by the venture's managers. Such decisions are made for defendant WCP's facilities by its president. Those decisions are made for the BBS facility by its vice president in charge of Alaska operations.

80. Except as described elsewhere, the superintendent of each facility is ultimately responsible for recruiting, screening, hiring, promoting and terminating employees for that facility. He is also ultimately responsible for assigning employees to bunkhouses, assigning crews to dining areas and making improvements which do not require capital expenditures.

81. At least since 1970 the superintendent of defendant BBS's facility has reported directly to that

defendant's vice president in charge of Alaska operations. During 1970-77 the president of WCP was also superintendent of Red Salmon Cannery. The superintendent of Wards Cove Cannery reported directly to him. Since 1977 superintendents of both canneries have reported directly to Alec W. Brindle, who is the current president of defendant WCP.

HIRING POLICIES AND PRACTICES

82. Preliminarily, it must be noted there are two (2) general categories of cannery jobs. The first category includes the "cannery" workers and "laborer" jobs. The second category includes all other departments and are designated "noncannery" jobs. It is the "noncannery" jobs which are at issue in this lawsuit.

83. None of the five class canneries has advertised for jobs at

least since 1970, although the Alaska State Employment Service has been called. Generally, vacancy notices have not been posted at the Bumble Bee, Red Salmon, Ward Cove or Ekuk canneries since 1970 and at least from 1970 through 1975 mid-season vacancies have not been posted at Alitak except for two positions for cook and one for "laundress-bedmaker".

84. Many of the jobs at defendants' facilities are covered by union contracts which have rehire preference clauses.

85. Defendants' policy and practice is to adhere to the union rehire preference clauses and to offer employment in the same jobs to past satisfactory employees for the new season. Employees, including nonresident cannery workers, take advantage of these clauses to secure employment. Nonresident cannery workers are those whose off-season residence is the

Lower 48. Resident cannery workers are those whose off-season residence is Alaska.

86. Hiring for all jobs except resident cannery workers and spring and fall laborers takes place at defendants' home offices in Seattle and Astoria during the first three months of the year. Most employees, particularly in the skilled jobs, are hired before April 1 each year for the upcoming season. Most non-cannery jobs also require availability by the end of April for that year.

87. The rehire preference rights of past employees are respected in determining the number of vacancies to be filled for the new season. The remaining vacancies are filled from among those who seek employment with defendants during the fall and winter preceding the upcoming season. Defendants do not

generally look to applications for the preceding season in filling openings for the upcoming season.

88. Defendants generally do not treat general oral inquiries about jobs made during the preceding season as an application for a position in the upcoming season a year away. This is particularly true when the employee fails to follow up the inquiry with an application. Defendants do not treat white or nonwhite persons differently in this respect.

89. Defendants receive far more applications than there are vacancies for the upcoming season. The majority of the applications for non-cannery worker positions are by whites or by persons who are not identifiable as racial minorities. Defendants have received relatively few applciations from nonwhite

employees for noncannery worker positions.

90. Resident cannery workers and spring and fall laborers are usually hired from the general labor force in the areas closest to each cannery. Except for Wards Cove, this labor force is small. The 1970 Census for the City of South Naknek, Exhibit A-35, illustrates this. The entire population of Bristol Bay Census Division, which covers thousands of square miles, was only 3,500 people in 1970. It is not a reasonable business practice to scour such sparsely populated, remote regions for skilled and experienced workers.

91. Except at Ekuk, non-resident cannery worker jobs which are not filled by employees with rehire preferences are filled through the dispatch procedure of Local 37.

92. Local 37 male members have refused to work in the egg department without overtime and by special agreement with the union workers outside the Local 37 source are hired although they must join the union.

93. Management does not direct any of its cannery worker foremen to hire or line up members of any particular race for his crew.

94. Employees and non-employees are free to apply for any job for which they feel qualified. Similarly situated applicants are treated equally.

PROMOTIONS

95. Most people hired at defendants' facilities are persons entitled to a rehire preference or are hired from the external labor market rather than through promotions or transfers from another position or department within the cannery.

96. There are very few midseason vacancies in jobs. There is not time during the season to fill such vacancies through a posting, application, interview and training procedure.

97. Most higher paying positions within a department are not filled from the lower paying positions within the same department at a cannery.

98. Midseason promotions or transfers across union and/or departmental lines are rare.

99. Promotions or transfers across departmental lines from one season to the next are rare.

100. Many of the spring and fall laborers hired by defendants are not available for employment during the summer season because they choose to fish instead.

REASONABLE BUSINESS PRACTICES

AND BUSINESS NECESSITY

101. The job preference clause operates like a seniority system.

102. Because of the intensity of the salmon run, the high cost of error, and demands placed upon the cannery, experienced applicants are given priority over inexperienced applicants even though both possess the same general skills.

103. Local 37 provides an oversupply of nonwhite cannery workers for all defendants' canneries except Ekuk.

LABOR MARKET

104. The employees in the various job classifications are not fungible. Each job or job department requires differing qualifications, primarily skill and/or experience. Preseason availability is often an important qualification. Defendants must look to the labor market providing individuals

with the skills and experience required by each job. Many noncannery workers' jobs require skills and qualifications not possessed by nor readily acquirable within a reasonable time by unskilled, inexperienced persons at the canneries.

105. The racial composition of cannery workers and laborers at defendants' facilities is predominently nonwhite. This is so because Local 37 is the primary source of non-resident cannery workers for all but one of defendants' facilities, and the membership and leadership of Local 37 is predominently Filipino.

106. Filipinos constitute about one percent (1%) of the population and approximately one percent (1%) of the labor force (over age eighteen) in the geographical region from which defendants draw their employees, that is, Alaska, the Pacific Northwest, and California.

107. The available labor supply in this relevant geographical area for cannery worker, laborer, and other nonskilled jobs is approximately ninety percent (90%) white. Nonwhites, particularly Filipinos and Alaska Natives, are thus greatly overrepresented in these jobs at the defendants' canneries.

108. Local 37, ILWU, has not asserted jurisdiction rights over non-resident cannery workers at Ekuk. Starting in 1971, Ekuk hired non-resident cannery workers without utilizing a Local 37 cannery worker foreman or the union in any way. The percentage of Filipino nonresident cannery workers hired by Ekuk is significantly less than the percentage of Filipinos hired as nonresident cannery workers at Red Salmon, Bumble Bee, Wards Cove, and Alitak - all four of which have a contract

with Local 37 to supply nonresident cannery workers.

109. Alaska Natives constitute only a small portion of the overall general population in the section of Alaska where canneries are located. However, in those remote, sparsely populated ares which are immediately adjacent to the canneries at Naknek, South Naknek, Alitak, and Ekuk, the native population is a significantly greater percentage than it is compared to the general Alaskan population which includes the predominately white city populations. Consequently, Alaska Natives comprise a high percentage of the local labor market for resident cannery workers and laborers at the canneries located at Naknek, South Naknek, Alitak, and Ekuk. For the same reason, that is, because of its Ketchikan location, the percentage of Alaska Natives hired at Wards Cove is significantly less than the

percentage of Alaska Natives hired as resident cannery workers at the other four facilities. This is so because the area immediately adjacent the Ward Cove Cannery is not sparsely populated.

110. Persons filling cannery worker and laborer jobs are not part of the labor supply for jobs requiring differing qualifications at defendants' facilities. Defendants' cannery workers and laborers do not form a labor pool for other jobs at defendants' facilities.

111. A Local 37 cannery worker who is transferred during the season to a job under another union's jurisdiction can claim both his season guarantee as a cannery worker in addition to his earnings in the new position.

112. Company policy has been to hire workers from without rather than to transfer or promote from within.

113. Most cannery worker and laborer jobs do not provide training for other work in the cannery. The skills acquired in most cannery worker and laborer jobs are not a substitute for the experience and skill requirements of the skilled noncannery worker jobs.

114. The end of each canning season terminates the employment of cannery workers.

115. The older Filipinos tend to dominate the other cannery workers in requests covering matters such as housing and messing.

116. There has been a general lack of interest by cannery workers in applying for noncannery workers jobs.

117. Most cannery worker jobs do not require that the employees be able to communicate effectively, or be literate, in the English language and none of them require early season availability. Most

other jobs at the canneries require both of these qualifications.

118. Most students are not available for preseason work required in most noncannery worker jobs.

119. Most of the jobs at the canneries entail migrant, seasonal labor. While as a general proposition, most people prefer full-year, fixed location employment near their homes, seasonal employment in the unique salmon industry is not comparable to most other types of migrant work, such as fruit and vegetable harvesting which, for example, may or may not involve a guaranteed wage.

120. Thus, while census data is dominated by people who prefer full-year, fixed-location employment, such data is nevertheless appropriate in defining labor supplies for migrant, seasonal work.

121. Based on a sample of almost one-half of the industry, 48% of the individuals employed in the Alaska salmon canning industry during 1970-78 were nonwhite. This is so primarily because nearly all employed in the "cannery worker" department are non-white. The institutional factor of Local 37's over-representation of non-whites accounts for this statistic. Accordingly, the court does not assign considerable weight to this statistic.

122. The percentage of nonwhites employed in the Alaska salmon canning industry during 1906-39 and 1941-55 has historically been from about 47% to 70%. Toward the end of this period it has stbilized at about 47% to 50%.

123. Eighty-eight percent (88%) of the class members are Alaska Natives or of Filipino descent. Defendants' labor market data proved that the percentage of

whites hired in the following jobs in the aggregate by facility or by combination of facilities is either less than the percent of whites in the labor supply or does not exceed the percentage of whites in the relevant labor supply by a statistically significant amount. In only a few instances does the percentage of whites hired in these jobs aggregated by department exceed the percentage of whites available in the relevant labor supply; in some instances, nonwhites are over represented in the jobs taken on a department-by department basis.

Administration: All jobs.

Beachgang: crane operator, gas man, net boss, net man, oil dock, outside foreman, pile buck foreman, setnet pickup, truct driver.

Carpenter: All jobs.

Culinary: baker, cook, cook/baker, steward/baker, steward/cook, steward.

Machinists: diesel operator, electrician, first machinist,

machinist foreman, mechanic, port engineer, refrigeration machinist, shop machinist, welder, machinist helper/ electrician, refrigeration machinist/can shop machinist, salmon cook/shop machinist, shop machinist/can shop machinist, shop machinist/pipe fitter, shop machinist/port engineer, shop machinist/ fireman.

Tender: captain.

Miscellaneous: all jobs except quality control, janitor, and laundry/cnannery worker.

All Year-Round Jobs:

Store/Stockroom: Naknek Trading Company.

Office: Administrative assistant.

Beachgang: beach boss, beachman, pile buck, beachman/truck driver.

Culinary: kitchen help, laundry, waiter/waitress.

Machinists: cold storage machinist, can shop machinist, casing machinist, filler machinist, fireman, iron chink machinist, machinist, machinist helper, machinist helper/oil cook, pipefitter/fireman, pipefitter, salmon cook/ pipefitter, salmon cook, seamer machinist, brite stack

machinist/pipe fitter, iron chink machinist/casing machinist, pipe fitter/oil cook.

Fisherman: company fisherman (captain and partner).

Miscellaneous: quality control, janitor, laundry/ cannery worker.

Office: (except for a few instances where they were seasonal, these jobs are year round), accountant, assistant bookkeeper, bookkeeper, office help, office manager, secretary.

Store/stockroom: stockroom help, stockman, storehelp, storekeeper, Naknek Trading Co. manager.

Tenders: deckhand, mate, mate/deckhand, talleyman, tender engineer, tenderman, tendercook/deckhand.

JOB QUALIFICATIONS

124. At the canneries, defendants do not provide on-the-job training of unskilled, inexperienced persons for jobs requiring skill and experience.

125. Because of the lack of time and personnel available for training at a salmon cannery, skills or qualifications cannot be considered "readily acquirable" unless they can be acquired within a matter of days with a minimal amount of training time required of supervisory and other skilled personnel.

To maximize production and minimize the amount of training which must be done at the canneries, defendants attempt to hire experienced persons in all job categories.

126. Qualifications required for any individual position depend to a certain extent on the cannery involved, the age and condition of equipment, skill level of other incumbents and supervisors, and other such factors. It is not practical or realistic, in terms of running a safe, efficient, and profitable operation to

staff each position with people meeting only the stated minimum requirements.

127. Many lower paying jobs (e.g., carpenter apprentice-helper, deckhand, machinist helper, kitchen help) within departments are not "entry level" positions for vacancies in higher paying positions within the same department at defendants' canneries.

128. The skills acquired in most cannery worker and laborer jobs are not a substitute for the experience and skill requirements of the skilled noncannery worker jobs.

129. Below is a composite list by department of all job titles which have been filled at any time, at any of defendants' facilities bewtween 1970-80: (No individual cannery would fill this many job titles in any given season.)

Administration:

Assistant Manager

Assistant Superintendent

Double Star Coordinator

Manager

Purchasing Agent

President

Roe Operations Manager

Sales Manager

Superintendent

Beachgang:

Beach Boss

Beachman

Beachman/Truck Driver

Crane Operator

Dock Manager

Gas Man

Net Boss

Net Man

Oil Dock (including Standard Oil dock crew)

Outside Foreman

Pilebuck

Pilebuck Foreman

Setnet Pickup

Truck Driver

Carpenter:

Carpenter

Carpenter Apprentice

Carpenter/Shipwright

Carpenter Foreman

Caulker

Contract Carpenter

Painter

Culinary:

Baker

Cook

Cook/Baker

Kitchen Help (includes bull cook)

Laundry

Steward/Baker

Steward/Cook

Steward

Waiter/Waitress

Cannery Worker:

Cannery Worker (includes crab and freezer processing workers)

Fisherman:

Company Fisherman (Bumble Bee, Red Salmon and Egegik only)

Machinist:

Brite Stack Machinist/ Pipefitter

Cold Storage Machinist

Can Shop Machinist

Casing Machinist

Diesel Operator

Electrician

Filler Machinist

Fireman

First Machinist

Salmon Butchering Machinist

Salmon Butchering Machinist/Cashing

Machinist

Machinist Foreman

Mechanic

Machinist Helper/Trainee

Machinist Helper/Electrician

Machinist Helper-Oil Cook

Pipe Fitter/Fireman

Pipe Fitter/Oil Cook

Pipe Fitter

Plant Engineer

Port Engineer

Refrigeration Machinist

Refrigeration Machinist/Can Shop Machinist

Salmon Cook

Salmon Cook/Fireman

Salmon Cook/Pipe Fitter

Salmon Cook/Shop Machinist

Seamer Machinist

Shop Machinist

Shop Machinist/Can Shop Machinist

Shop Machinist/Pipe Fitter

Shop Machinist/Port Engineer

Shop Machinist/Fireman

Welder

Laborer:

General Laborer

Spring/Fall Workers

Office:

Accountant

Administrative Assistant

Assistant Accountant

Assistant Bookkeeper

Bookkeeper

Office Help

Office Manager

Purchasing/Bookkeeper

Sales Clerk

Secretary

Store and Stockroom:

Naknet Trading Co. Manager

Stockman

Stockroom Help

Storehelp

Storekeeper

Tenders:

Captain

Deckhand

Mate

Mate/Deckhand

Tallyman

Tender Engineer

Tenderman

Tender Cook/Deckhand (includes Tender Cook)

Miscellaneous:

Affirmative Action Representative

Beachman/Store Helper

Consultant

Double Star Captain

Double Star Carpenter

Double Star Cook

Double Star Cannery Worker

Double Star Deckhand

Double Star Engineer

Double Star Foreman

Double Star Mate

Foreman (Unspecified)

Inventory Control

Janitor

Maintenance

Miscellaneous

Monkey Boat Operator

Nurse

Office Helper/Store Helper

Quality Control

Radio Operator

Recruiter

Roustabout

Store Helper/Kitchen Helper

Traffic Manager

Night Watchman

Winter Laborers and Assistants to Winter Watchman

Winter Watchman

(Employees with no job title are included in this department)

L.U.T. Yard:

Yardworker

Yard Foreman

Certain persons who have appeared on cannery payrolls, but are either not employees (independent fishermen) or who worked on special construction projects and were hired by the

constructions project manager are not included in a department.

Virtually all of the jobs in the administration and office job departments are filled by year-round employees who work at company headquarters. As part of their regular job duties, most of them work at company headquarters in the offseason but at the defendants' facilities in Alaska during the salmon processing season. There are also many individuals, primarily in the machinist, carpenter, and tender departments, who are for all practical purposes year-round employees. They work at defendants' shipyards in the offseason and, as part of their regular job duties, work at defendants' Alaska facilities during the season.

130. The following jobs are supervisory, require management

abilities, and extensive experience to successfully perform:

(a) superintendent (manager)

(b) cannery (machinist) foreman

(c) assistant superintendent (assistant manager)

(d) first machinist

(e) office manager

(f) carpenter foreman

(g) beach boss

(h) net boss

(i) setnet pickup boss

(j) tender captain

(k) steward

(l) first cook (if no steward at facility)

(m) outside foreman (Ekuk)

(n) skipper of Double Star

(o) Manager of Naknek Trading Co.

(p) pileback foreman

131. The following jobs require substantial prior skill and experience to successfully perform:

(a) port engineer

(b) wet tender (briner) engineer

(c) carpenter

(d) carpenter/shipwright

(e) caulker

(f) shop machinist

(g) refrigeration man

(h) electrician

(i) steward

(j) baker

(k) cook

(l) radioman

(m) doctor

(n) nurse

(o) accountant

(p) company fisherman

(q) welder

(r) pipe fitter

(s) pilebuck

(t) netman

(u) crane operator

(v) cold storage machinist

(w) Double Star engineer

(x) Standard Oil distributorship manager

(y) traffic manager

(z) sales manager

(aa) purchasing agent

132. Qualifications reasonably required for successful performance of the jobs listed below are as follows:

Salmon Butchering Machinist. Requires two seasons experience as a helper-trainee in the fish house with one winter of offseason training or one year of mechanical experience of a similar nature. This job also

requires an ability to work with minimum supervision and without the aid of shop manuals, a knowledge of and ability to use mechanic's hand tools for adjustments and repair of equipment, early season availability, and ability to understand and communicate effectively in English. Must be capable of training a machinist helper-trainee in the fish house if one is employed.

Reformer-Can Shop Machinist. Requires two seasons as machinist helper-trainer in cannery or six months mechanical experience of a similar nature. Job requires the

ability to work without close supervision, knowledge of and ability to use seam micrometers, gauges and mechanic's hand tools to comprehend, and communicate effectively in English, understand mechanical drawings, and possess leadership skills. Early season availability is also required.

Fillerman. Requires two seasons as machinist helper-trainer on the canning line with one winter of offseason training, or one year of mechanical experience of a similar nature. Knowledge of and ability to use mechanic's hand tools to

make adjustments and repairs to equipment is required. Ability to read, comprehend, and communicate effectively and availability are required. Leadership skills may also be required.

Filler Operator. See machinist helper-trainee.

Seamerman. Requires two seasons experience as a machinist helper-trainee in the cannery or six months mechanical experience of a similar nature. Ability to read, comprehend, and communicate effectively in English is required. Knowledge of and ability

to use mechanic's hand tools to make adjustments and repairs to equipment is required. Early season availability is also required.

Seamer Operator. See machinist helper-trainee.

Salmon Cook-Pipefitter. Requires one year of plumbing and/or pipefitting experience, less depending on amount and type of experience with boilers or pressure vessels. Job requires proficiency in basic mathematics, ability to read gauges and thermometers, and ability to handle the strain, responsibility, and

pressure of "cooking" as many as nine retort loads of salmon simultaneously. Must have knowledge of and ability to use mechanic's and pipefitter's tools to make adjustments and repairs. Must be able to understand and accurately complete required inspection and report forms required by governmental agencies and industry associations. Early season availability is also required.

Machinist Helper-Trainee. Requires mechanical ability, knowledge of and ability to use mechanic's tools. Must be flexible, willing to learn, and to

follow directions. Must be able to communicate effectively in English and have the ability to read and comprehend English if placed in canning line or can shop. Early season availability is required.

Fireman. Requires mechanical ability, ability to use mechanic's and some pipefitting tools, and early season availability. (In addition, for the above machinist crew jobs, possession of at least one of the following additional skills is highly desirable and preferred in hiring: welding, pipefitting,

electrician, and machine shop; requires willingness and ability to work independently or with other crew members in performing a wide variety of maintenance and repair tasks on cannery buildings, grounds, fixtures, and equipment).

Quality Control. Requires ability to read, comprehend, and communicate effectively in English, ability to check weights, record temperatures, and use basic mathematics through decimals. Must have ability to handle detail, be able to handle reports and paperwork, be

reliable, and be honest. One season of general cannery experience or other relevant experience or education, such as food technology, is required.

Beachman. Requires good health, and the capacity for and ability to perform heavy work out-of-doors. Requires familiarity with wide range of hand tools (both mechanical and carpentry), small power tools, and operation of forklifts and other equipment. Minimum qualification requirements vary depending on size of beachgang: the larger the beachgang, the greater the ability to take on less

skilled personnel. Minimum qualifications for a new beachman joining a crew of three or more beachmen (not including beach boss) would be three to six months prior heavy work experience, preferably out-of-doors and construction or shipyard related.

Dry Tender Engineer. Requires one year of related boat experience or six months engine mechanical experience and one season of tender experience, knowledge of and ability to use mechanic's and some pipefitting tools to make adjustments and repairs to

shipboard machinery and equipment, ability to live in small quarters and function as an effective member of a small group. Willingness and ability to work long hours on ocean-going vessel is required. Ability to act as relief helmsman and back-up navigator may be required on some boats.

Accountant. For portion of job performed in Alaska, see Bookkeeper.

Bookkeeper. Requires two years formal bookkeeping education or comparable work experience, familiarity with use of computers in data processing depends on

location, typing and ability to accuratley operate ten-key calculator. Two seasons as assistant cannery bookkeeper would also satisfy requirements. English literacy and preseason availability are required.

Assistant Bookkeeper. Requires knowledge of basic bookkeeping, basic mathematics, familiarity with use of computers in data processing depends on location. Job also requires ability to use typewriter and accurately operate ten-key calculator. English literacy is required.

Preseason availability required.

Office Assistant/ Bookkeeper-Helper.

Requires knowledge such as would be obtained from office practice training course or comparable work experience, knowledge of basic mathematics, ability to type, and ability to accurately use ten-key calculator. Preseason availability may be required. English literacy required.

For those of the above jobs which may be year-round, the stated qualifications do not necessarily deal with the

off-season requirements of their jobs.

133. The qualifications necessary to successfully perform the remaining jobs are as follows:

Deckhand: Aptitude for marine work, early season availability, willingness to work long, irregular hours on ocean-going vessel. Marine experience preferred. English language required.

Tender Cook/Deckhand: Cooking experience, amount and type depends on location, aptitude for marine work, willingness to work long irregular hours in cramped quarters on ocean-going vessel, early season availability,

English language required, marine cooking experience preferred.

Company Fishing Boat Partner: Determined by captain, but generally fishing experience and aptitude for marine work, willingness to work long hours on very cramped ocean-going vessel, and willingness to work on a "share" basis (that is, without any guaranteed wage, wage rate, or salary).

Carpenter Apprentice: Aptitude for carpentry work. Early season availability. Carpentry work experience preferred. English language required.

Truck Driver and Setnet Pickup. Driving experience, amount and type depends on truck involved. Driver's license. English language required.

Stockman. English literacy; record keeping ability; knowledge of hardware, machinery, and parts.

Storekeeper. Requires knowledge of and ability to perform record keeping and basic bookkeeping, maintain credit records, manage inventory records, ordering of supplies. Must be physically able and willing to stock shelves. Early season

availability required. At larger stores (Ekuk, Chignik, Bumble Bee) must have considerable retail experience. At smaller stores (Alitak, Port Bailey, Keni) must have some retail experience. English literacy.

Storekeeper At Wards Cove. Must have driver's license, physical strength, and English literacy.

Winter Watchman and Caretaker. Must be responsible individual willing to spend several months in winter weather at very isolated locations. Qualifications depend somewhat on

location, but generally person must have the skill and ability to diagnose, maintain, and effect repairs on various cannery equipment and buildings.

134. The parties agree that no prior special skills are necessary to perform the following miscellaneous jobs: gasman or oilman, apprentice carpenter, carpenter's helper, winter watchman, night watchman, AFU waiter, and AFU dishwasher. The court finds that all at-issue (noncannery and non-laborer) jobs are skilled positions except for the following titles:

1. Piledriver
2. Kitchen help
3. Waiter/Waitress
4. Janitor
5. Oildock Crew
6. Night Watchman

7. Tallyman
8. Laundry
9. Gasman
10. Roustabout
11. Store Help
12. Stockroom Help
13. Assistant Caretaker (winter watchman and watchman's assistant)
14. Machinist Helper/Trainee
15. Deckhand
16. Apprentice Carpenter/Carpenter's Helper

INCIDENTS OF RACE-LABELING AND RACIAL COMMENTS

135. Various memos written by agents of defendants during the period of 1970 to 1973 and occasionally later included the following references: "Filipino cannery workers", "Native cannery workers", "Native Gallery Cook", "Filipino Mess",

"Eskimos", "Filipino, Eskimo, Women", "Young native boys", "the Filipino Union", "white boys", "Native crew", and "Phillipine Bunkhouse". See e.g., Exh. 245, 254, 300, 322-26, 330-37, 397, 452, 721

136. A memo dated May 15, 1976, from John Korzan states, "In 1975 we ordered 175 badges numbering one thru 175 for use in our cannery for purposes of identifying our Eskimo cannery workers". Exh. 458.

137. BBS's company personnel records listed employee number badge assignments as follows:

BADGE ASSIGNMENT	
01-1 thru 01-99	Company Fishermen
02-100 thru 02-149	Lease Fishermen
02-150 thru 02-299	Independent Fishermen
02-300 thru 02-399	Setnetters
03-400 thru 03-429	Power Scows
04-430	Beach Boss

05-431 thru 05-440	Beach Gang and Truck Drivers
06	Fish Boss
07	Net Boss
08-445 thru 08-474	Machinists
09-475 thru 09-524	Girls
09-525 thru 09-574	Filipinos
09-575 thru 09-659	Natives
09-660 thru 09-674	Miscellaneous
10-675 thru 10-699	Carpenters
11-700 thru 11-729	Commissary
12-730 thru 12-739	Labor
13-740 thru 13-750	Other Labor

Exh. 467.

138. Laundry for nonresident cannery workers at Wards Cove was stored in bags marked "Oriental Bunkhouse", and the mail slot where the nonresident cannery workers received their mail was similarly marked.

139. A letter from A. W. Brindle dated December 15, 1970 states:

> There is one more thing I want to tell you that probably will happen. We built a new bunkhouse. We expected to move all the carpenters and all the machinists into it. Apparently this is not working out due to the beachmen coming in and out. I have considered now taking the room that Vern used to have and the two rooms that Ned had and making those rooms into a room for the beachmen and putting a shower in so they would be away from the fishermen. The (sic) come in and out at night and it would be quieter for them. I would then use the new bunkhouse for women. The reason for this is these Eskimos are completely impossible. We have nothing but trouble and we probably had less trouble than the majority. Nelbro for instance had 43 quit one morning. We had all of our refuse to go to work on July 2nd at 8 o'clock until I agreed to give them additional pay over and above the contract.

Exh. 452.

140. A memo from Winn F. Brindle dated December 29, 1972 states:

> This letter from Frank B. Peterson is to give Salvador a bit of status in the community.
>
> As you well know, the Filipinos both at home and

abroad are difficult to deal with.

Exh. 253.

141. A May 25, 1970 memo from Don Ballard to the Seattle office of WCP states in part:

> Hardy, could you check with Mayflower press about those little square pre-printed cards for the buttons. We should have had them up here before now, we got 24 Eskimos in yesterday and I would like to get these things made up so I know who they are and also to keep the other bums out of the Mess Hall.

Exh. 454.

MESSING

142. As stated earlier, Filipino and Asians are overrepresented in Local 37.

143. The bargaining representative for nonresident cannery workers have traditionally asked for Oriental and Filipino food, and a separate menu for its members. Management has acceded to these wishes. The older persons in the Local 37 crews prefer this arrangement.

144. The Local 37 contract provides for a separate culinary crew for the Local 37 crew.

145. The quality and quantity of food served in mess halls is the responsibility of the cook in the mess hall. Most complaints about the food can be traced to matters of personal taste or competence of the cook.

146. Defendants have ordered special food for the non-resident cannery worker mess halls in accordance with the Local 37 union leaders' or cooks' desires without unreasonable budgetary restrictions.

147. The few whites in Local 37 ate with the Filipinos in the Local 37 mess. See testimony of David Yoshizumi.

HOUSING

148. In response to a written inquiry about employment, Hardy Parrish

in a letter dated January 25, 1971, wrote:

> We are not in a position to take many young fellows to our Bristol Bay canneries as they do not have the background for our type of employees. Our cannery labor is either Eskimo or Filipino and we do not have the facilities to mix others with these groups. Another thing is the time element, most of the college boys do not get out of school early enough to fit in with our requirements.

Exh. 251. At the time of writing this letter, Mr. Parrish was a cannery foreman for WCP. Presently, he is cannery superintendent for CWF at Kenai, Alaska.

149. While defendants have made significant improvements in all worker housing, from 1970 to 1973, and while most of defendants' employees live in integrated bunkhouses, housing where non-whites predominate has generally been poorer than housing whites predominate. However, any differences in housing quality are not attributable to the race

of the occupants. Instead, differences are attributable to the following industrial circumstances:

A. Workers are generally housed according to job department and time of arrival. The larger cannery worker bunkhouses are not opened up during the preseason, but rather, are prepared within a few days of the anticipated beginning of the salmon run at each location which is when the cannery crews arrive. By this time, most other employees have already begun working, are housed, and there are few, if any, spaces available except in the cannery worker bunkhouses.

B. Since cannery workers are housed for the shortest period of time (during the summer), they do not need the better insulated buildings required for the noncannery worker employees who

arrive at the cannery earlier and stay later.

C. Generally, persons working in different departments do not work the same shifts.

INDIVIDUAL INSTANCES

150. In May of 1977, Moses Friendly, who is of Alaska Native descent, applied to defendants in writing for a summer clerical job, but was not hired.

151. In May of 1976, Jimmie Akanakyak, who is of Alaska Native descent, applied to defendants in writing for a storekeeper job in 1976, but was not hired in that job that year.

152. In February of 1977, Kim Tsijui, who is of Japanese descent, applied in writing for a waitress or clerical summer job, but was not hired in any job.

153. Ed Daba, who is of Filipino descent, applied on April 30, 1976, in

writing for a job as tender deckhand, as a machinist trainee or in another noncannery worker job, but was not hired. At the time of his application, all noncannery jobs had been filled.

154. Orlando Bucsit, who is of Filipino descent, applied orally to Ward Cove Cannery superintendent Joseph Brindle and at 88 East Hamlin for a job on a tender in 1980, but was not hired in that job.

155. Richard Gurtiza, who is of Filipino descent, applied orally to Ward Cove Cannery superintendent Joseph Brindle for a job which was about to open up on a tender part way into the 1977 season. He was not hired in that job. However, after the season was over Joseph Brindle allowed Richard Gurtiza to work on a tender for the seven-day trip south to Seattle.

156. In May of 1971, Clark Kido, who is of Japanese descent and was a student, applied at East Hamlin for a carpenter job, machinist job or other noncannery worker job orally and in writing, stating he could be available in mid-May, by arranging to complete his final exams early. In late April or early May of 1975, Mr. Kido similarly applied for interim employment. At that time Mr. Kido had been laid off as a full-time structural engineer at Boeing. Both times he was instructed no openings existed. Mr. Kido previously worked for defendants as a cannery worker. The jobs for which he applied, however, required pre-season availability and were filled in early spring.

157. Carlos Garces, who is of Mexican descent, applied in writing and orally in March of 1976, asking for any job at Ekuk or at any other cannery.

Mr. Garces had no experience, had an educational background in mechanical engineering but did not so state on his application. However, Mr. Ekern, with whom Mr. Garces spoke at the time he applied, did not ask Mr. Garces his qualifications. His status at the time of application was that of student.

158. Charles Tangalan, who is of Filipino descent, felt uncomfortable applying for a noncannery job because he thought Filipinos who worked in the cannery were supposed to be on the cannery crew. In addition, he felt he would be unable to get a job outside the cannery because he was not related to other company employees. Thus, he did not apply for other jobs.

159. Frank Atonio, who is of Samoan descent, inquired orally of Wards Cove cannery foreman Ray Landry regarding machinist jobs on a Sunday in 1973. He

inquired orally at the end of the 1973 season of Wards Cove Cannery superintendent Joseph Brindle for a machinist, carpenter or tender job; and orally at the end of the 1973 season to the Ward Cove bookkeeper Jerry Steele concerning a tender or clerical job but was not hired at that time. Mr. Atonio did not disclose any qualifications, and he was not asked about qualifications. He did not follow through with a written application, and his inquiries came at a time when the jobs had been filled for the season. Mr. Atonio was employed in noncannery jobs (beachgang and tender deckhand) in 1979 and 1980. His applications for these jobs were made preseason. He was rehired for the 1981 season for a job as a tender deckhand at the Kenai facility but quit before the boat departed.

160. In 1966 or 1967, during the canning season, Mike Eddie Antonio, who is of Filipino descent, orally inquired of the Red Salmon beach boss, Vern Jones, about how one went about getting a beach gang job. In 1966 or 1967, Mr. Antonio orally asked the Red Salmon head machinist how one goes about getting a machinist's job.

161. In 1973, Ronald Barber, who is of Filipino descent, was a student, and worked seasonally for various canneries, orally asked Ward Cove (cannery worker) foreman Salvador del Fierro for a quality control, clerical, storekeeper or machinist helper job, but was not hired for these jobs. Mr. Barber's requests were directed at an employee without hiring authority for those jobs. The inquiries were made during the season when those positions were already filled.

162. Andy Pascua, who is of Filipino descent, worked at Red Salmon in 1970 and 1971 but did not apply for a machinists job during those years. Mr. Pascua did inquire of a Red Salmon employee as to how one would go about getting such a job. Mr. Pascua's inquiry, however, was directed at any employee with no hiring power.

163. Lester Kuramoto, who is of Japanese descent, worked as a cannery worker at Ward Cove Cannery during the summers of 1970, 1971, 1972 and 1973 and worked as a cannery worker at Bumble Bee cannery during the summer of 1971. He applied orally in 1971 at 88 East Hamlin for any job.

164. Gene Viernes, who was of Filipino descent, worked at Red Salmon during the summers of 1969, 1971, and 1972 and at Ward Cove during the summers of 1966, 1969 and 1973. In 1973, Mr. Viernes

was fired for dropping and driving over canned fish he was transporting with the fork lift. In 1977, he orally inquired of Alec Brindle about getting hired as a cannery worker for that season, but was not hired.

165. William T. Pascua, who is of Filipino descent, worked for Ward Cove Packing at Red Salmon during the 1971-1972 seasons. While at Red Salmon, Mr. Pascua wanted a clerical or quality control job, but did not ask for one because he believed that Andy Pascua and Gene Viernes had unsuccessfully inquired about such jobs.

166. Benjamin Tabayoyon, who is of Filipino descent, worked for Ward Cove Packing at Red Salmon during the 1969-1971 seasons. During those seasons he inquired of the machinists and fishermen how they got their jobs.

167. Eugene Baclig, who is of Filipino descent, worked at Red Salmon during the 1969-72 seasons and at Ward Cove Cannery during the 1973 season. He did not apply for jobs other than a cannery job because the upper level jobs appeared to him to be all white.

168. Phillip Fujii, who is of Japanese descent, worked at Wards Cove Cannery during the summer of 1972. He was interested in a machinist job, but did not apply because he did not know what qualifications were necessary and what openings existed. Also, he did not see any Japanese or other non-whites working at Wards Cove, and overheard other employees say that one had to have connections or past experience to receive a high paying position.

169. Randy del Fierro, who is of Filipino descent, worked as a cannery worker for Wards Cove Packing at Wards

Cove Cannery in the 1970, 1972 and 1973 seaons; he worked at Alitak in the summer of 1971. Mr. del Fierro's grandfather, Salvador del Fierro, was foreman at Wards Cove Cannery in 1970, 1972 and 1973. Mr. del Fierro did not apply for an upper level job because he was told by members of his crew that job segregation was "just the way it was". Ct. Rec. 710 at 2, ll. 30-31. In addition, he saw few minorities occupying positions other than cannery worker positions.

170. Curtis Lew, who is of Chinese descent, worked at Wards Cove Cannery during the 1972 and 1973 seasons. He felt he was qualified for jobs other than as a cannery worker, but never told anyone about his qualifications because he did not believe there was any way he could advance due to the lack of posted openings and racial imbalance among the jobs.

171. Joaquin Arruiza, who is of Filipino descent, worked at Bumble Bee Cannery during the 1971, 1972 and 1973 seasons, and was interested in jobs outside the cannery crew. However, he never saw a written announcement, and no one informed him of promotional opportunities.

172. Allen Lew, who is of Chinese descent, worked at Wards Cove Cannery during the summers of 1972 and 1973. At that time, he was a full-time student at the University of Washington and not available for preseason work. Mr. Lew did not know how the defendants employed persons in the upper level jobs. It was Mr. Lew's impression that he would have been qualified for quality control, tenderman, and bookkeeper positons, but he remained a cannery worker.

DISCUSSION

JURISDICTION:

As stated earlier, this action challenges employment practices by WCP, BBS, and CWF under Title VII and under Sec. 1981. Except for CWF, exhaustion requirements have been met or waived, Zipes v. Trans World Airlines, ___ U.S. ___, 50 U.S.L.W. 4238 (Feb. 23, 1982), and jurisdiction exists in this court. With respect to the Title VII claims against CWF at Alitak and Ekuk, Judge McGovern dismissed all such claims, and the Ninth Circuit affirmed the dismissal because the claims were time barred. Atonio v. Ward Cove Packing Co., Inc., 703 F.2d 329, 331 (9th Cir. 1982). Plaintiffs urge in their Supplemental Final Argument that since WCP and BBS are essentially joint venturers, the two should be liable for any Title VII claims against CWF. However, this court is bound

by the Ninth Circuit's ruling affirming the dismissal of the claims in question. Accordingly, the court may not now utilize the joint venture theory to find liability on claims which no longer exist.

BURDEN OF PROOF:

At the outset, it should be noted that Section 1981 "does not embody the same broad, prophylactic purpose as does Title VII". Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30, 694 F.2d 531, 537 (9th Cir. 1983). Therefore, a plaintiff suing under Sec. 1981 must show intentional discrimination to establish a prima facie case. Id. Under Title VII, however, there are two theories of liability, the "disparate treatment" model and the "disparate impact" approach. A prima facie "disparate impact" case may be established without any proof of intentional discrimination.

Instead, where a business practice, which is neutral on its face, is shown to have a significant, adverse impact upon a class protected by Title VII, the plaintiff has made out a prima facie case, and the burden of proof shifts to the defendant to show that the practice is justified by "business necessity". Contreras v. City of Los Angeles, 656 F.2d 1267, 1275-80 (9th Cir. 1981). Thus, good intent is not a defense in "impact" cases. Gay, 694 F.2d at 537. Under the "disparate treatment" mode, certain individuals are singled out, and treated less favorably than others based upon race, religion, sex or national origin. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n. 15 (1977).

Treatment cases, like Sec. 1981 claims, require proof of intentional racial discrimination. Gay, 694 F.2d at

537. While the "burden of proof" shifts in "impact" cases, in "treatment" actions the burden which shifts to defendant after establishment of a prima facie case is only a burden of "production". It is clear the burden of persuasion remains with the plaintiff. Texas Dept of Community Affairs v. Burdine, 450 U.S. 248, 257 (1981); Gay, 694 F.2d at 537, n.4. Prima facie disparate treatment (and Sec. 1981) is established by proof of facts sufficient to support an inference of intentional discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). But see, United States Postal Service v. Aikens, ___ U.S. ___, 103 S. Ct. 1478, 1482 (1983) (when a defendant fails to persuade the district court to dismiss for lack of a prima facie case, the factfinder must decide whether defendants' conduct was intentionally discriminatory regardless of whether

plaintiff really made out a prima facie case).

It must be decided whether the disparate treatment or the disparate impact theory, or both, applies to plaintiffs' Title VII claims in this action. If both apply, it must be decided whether both apply to all aspects of the action. Plaintiffs argue that both models of liability are applicable. Defendants counter that only the treatment theory is appropriate here since the allegations are of wideranging discrimination. Until recently, the answer to this question was relatively easy. In Heagney v. University of Washington, 642 F.2d 1157, 1163 (9th Cir. 1981) the court found that the impact model only applied to "objective" employment practices:

> It is apparent, however, that the creation of jobs that are exempt from the Washington personnel law cannot be equated

with such well-defined objective employment practices as personnel tests or minimal physical requirements. Classification of certain jobs as "exempt" only meant that the University had wider discretion to establish the employee salaries. Subjective employment decisions may result in discrimination, but the use of subjective criteria is not per se illegal. [Citation omitted.] The gravamen of Heagney's complaint is that the lack of well-defined employment criteria allowed a pattern or practice of discrimination to exist. We therefore conclude that "impact" analysis is inappropriate and that Heagney was required to prove disparate treatment.

Accord, O'Brien v. Sky Chefs, Inc., 670 F.2d 864 (9th Cir. 1982). As recently discussed in Moore v. Hughes Helicoptors, Inc., 708 F.2d 475, 481 & n.4 (9th Cir. 1983), there is a split among the courts of appeal on the applicability of the impact model to subjective employee selection practices, and the Heagney approach is consistent with holdings in the Fourth, Fifth, Eighth, and Tenth

Circuits. See, e.g., Pope v. City of Hickory, N.C., 679 F.2d 20, 22 (4th Cir. 1982); Pouncey v. Prudential Insurance Co. of America, 668 F.2d 795, 800-01 (5th Cir. 1982); Harris v. Ford Motor Co., 651 F.2d 609, 611 (8th Cir. 1981); Mortensen v. Callaway, 672 F.2d 822, 824 (10th Cir. 1982). However, after Heagney was decided, in Wang v. Hoffman, 694 F.2d 1146, 1147 (9th Cir. 1982), the court of appeals took a contrary position to Heagney without citation to that case. The Wang majority concluded that "to prevail on his [impact] theory, Wang need only demonstrate the lack of objective criteria and a disparity in job promotions." Id. at 1148. The Moore court, supra, 708 F.2d at 481-82 recognized that the law in this circuit is unsettled, but did not find it necessary to resolve the rule at that time. While the Wang approach may find support from

the Sixth Circuit, Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 95 (6th Cir. 1982), until the Ninth Circuit by en banc opinion specifically overrules Heagney and its progeny, this court is bound by its rule since it predates Wang.

The conclusion that subjective decisionmaking is not susceptible to the impact approach does not dispose of the impact model for all areas of this case. Rather, there are aspects of the Wang case which survive the Heagney rule and bear upon issues before this court. That is, to the extent there is a language skills requirement (speaking English) for the at-issue jobs, such a requirement arguably should be deemed "objective" and is therefore properly addressed by impact analysis, since on its face, it would have a disparate impact on minorities. While this issue is not squarely addressed by the parties, it is the conclusion of this

court that given the nature of the cannery business, defendants met their burden of proof in demonstrating business necessity for a language requirement in upper level jobs. Specifically, the industry labors under the scrutiny of strict health regulations. The slightest mistake in calibrating can size or in retort management, for example, could result in a threat of wide-spread botulism, a disease fatal to humans. Fishermen who are unable to quickly communicate with one another may place themselves and others in great peril during stormy ocean weather. There is insufficient time and personnel for exhaustive training in this unique seasonal industry which deals with highly perishable food products.

Another area which must be analyzed separately from the intentional discrimination model concerns the pervasive incidence of nepotism at the

canneries. Recently, the Ninth Circuit Court of Appeals held that a shareholder preference plan in which shareholder ownership was concedely limited to persons of Italian ancestry and were either members of the family or close friends of a current shareholder was susceptible to impact analysis. Bonilla v. Oakland Scavenger Co, 697 F.2d 1297, (9th Cir. 1982). Particularly, this was so because the company in Bonilla tied preferential wages and job assignments to ownership of its stock. Consequently, the undisputed nepotistic preference plan was a condition of employment. Id. See, also, Gibson v. Local 40, Supercargoes & Checkers, Etc., 543 F.2d 1259, 1268 (9th Cir. 1976) (evidence of purpose to discriminate is unnecessary where employee is hired solely because of his relationship to other employees). Relatives of whites

and particularly nonwhites appear in high incidence at the canneries. However, defendants have established that the relatives hired in at-issue jobs were highly qualified for the positions in which they were hired and were chosen because of their qualifications. In addition, plaintiffs' nepotism figures failed to differentiate those persons who became related through marriage after starting work at the canneries. Consequently, the nepotism which is present in the at-issue jobs does not exist because of a "preference" for relatives. Id.[1]

1. Plaintiffs' evidence established that some nonwhites were hired in cannery positions through Local 37 due to relationship with other union cannery workers. However, these positions are not in question, and this evidence has little, if any, bearing upon the at-issue jobs. The Union has not been named as a defendant and the named defendants may not be held vicariously liable for union conduct. General Building Contractors Association, Inc. v. Pennsylvania, et al., 102 S. Ct. 3141, 73 L. Ed.2d 835 (1982).

Having concluded that the language requirement and incidence of nepotism do not separately constitute impact violations of Title VII under the circumstances presented by this action, both must nevertheless be considered singly and collectively together with plaintiffs' evidence of defendants' failure to post openings, general lack of objective job qualifications, lack of a formal promotion procedure, and the practice of rehiring past employees in their old jobs to determine whether an inference of intentional discrimination has been raised. The court would further note that should plaintiffs prove that they were prevented from obtaining seniority because of defendants' discriminatory hiring practices, the rehire practice must then be separately evaluated to determine whether the effects of the past discriminatory hiring

practices (if established) was perpetuated through the rehire practice. Presumably, in such a case, the rehire practice could constitute a separate Title VII violation, regardless of whether defendants acted with a discriminatory purpose. See Gibson, 543 F.2d at 1268. Accord, Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982). For reasons to be discussed, infra, such an analysis is inapplicable here.

SKILLS:

As earlier stated, all at-issue (non-cannery and non-laborer) jobs are skilled positions except for the following titles:

1. Piledriver
2. Kitchen help
3. Waiter/Waitress
4. Janitor
5. Oildock Crew
6. Night Watchman
7. Tallyman
8. Laundry
9. Gasman
10. Roustabout

11. Store Help
12. Stockroom Help
13. Assistant Caretaker (winter watchman and watchman's assistant)
14. Machinist Helper/Trainee
15. Deckhand
16. Apprentice Carpenter/Carpenter's Helper

It may be that under a different factual setting, some of the positions which this court finds to be skilled, e.g., truckdriving on the beach, fit into the category of jobs which require skills that are readily acquirable by persons in the general public under Hazelwood School District v. United States, 433 U.S. 299, 308 & n.13 (1977). However, what is readily acquirable under the circumstance of a full-year operation such as the setting in Teamsters, supra, is not readily acquirable in the salmon cannery industry.

With respect to the machinist helper/trainee; apprentice carpenter, and carpenter's helper; and deckhand

positions, although such postions are essentially unskilled, preseason availability is a necessary qualification.

STATISTICS:

Plaintiffs rely upon two types of statistics, ones which allegedly show that non-whites were under-represented in the upper-level jobs when compared with the percentage of non-whites in the available labor supply claimed by plaintiffs and "comparative" statistics which show a pattern of job segregation throughout the cannery work forces.

When full-year, fixed location employment is at issue, the population of some portion of the surrounding community is normally taken as the labor supply. Hazelwood School District v. United States, 433 U.S. 299 (1977). However, defining an employer's labor supply is a question of fact, Williams v. Owens-

Illinois, Inc., 665 F.2d 918, 927 (9th Cir. 1982), and courts "must be flexible in defining the relevant labor market". Domingo v. New England Fish Co., 445 F. Supp. 421, 433 (W.D. Wash. 1977).

Here, as in Domingo, plaintiffs incorrectly assume that the historical general hiring percentages in the industry as a whole mean that defendants hired nonwhites in the same percentage as their availability in the labor market. Id. However, the evidence does not support such a conclusion because of institutional factors which greatly distort the racial composition of the workforce. Id. The most significant example is the circumstance that Local 37, which dispatches non-resident cannery workers, is almost entirely Filipino. Id.

Stated differently, this court is unable to assign significant probative

value to plaintiffs labor supply statistics because the plaintiffs' data base premise does not reflect the important factor that Alaskan Natives and Filipinos, combined, represent only about one percent of the population of Alaska, Washington, and Oregon from which state defendants draw their workforce.

Plaintiffs' statistical evidence showed significant disparities between the at-issue jobs and the total workforce at the canneries. Such comparative statistics are highly probative of discrimination pattern or practice where, as here, the positions enumerated at page 63 are essentially unskilled or involve skills that many persons possess or can easily learn. Piva v. Xerox Corp., 654 F.2d 591 (9th Cir. 1981). See, also, Moore v. Hughes Helicopters, Inc., supra, 708 F.2d at 483. Thus, the court concludes that plaintiffs establish a

prima facie case of intentional discrimination with respect to the positions enumerated at page 63. Nevertheless, defendants satisfied their burden of production and plaintiffs failed in their ultimate burden of persuasion for the reasons earlier stated and for the reasons discussed infra. Of particular significance to the court in making this finding, was the lack of evidence of early and formal applications, to be distinguished from oral inquiries. I have excluded from my consideration the positions of winter watchman and winter watchman's assistant since those positions are not seasonal. Consequently, the latter two positions would not be available to students, and evidence of other class interest was not presented.

Relying upon O'Brien v. Sky Chefs, Inc., 670 F.2d 865, 867 (9th Cir. 1982),

plaintiffs argue that their evidence was also sufficient for a prima facie showing with respect to the at-issue positions which this court has found to be skilled. This is so, it is asserted, because subjective decisionmaking strengthens an inference of discrimination, and requiring a prima facie showing of class qualifications when qualifications are unknown would be an insurmountable burden. However, the Sky Chefs case did not involve skilled positions. If special skills are required for a job, as here, "the proxy pool must be that of the local labor force possessing the requisite skills." Moore v. Hughes Helicopters, Inc., supra, 708 F.2d at 482 & n.5. In addition, the experts agreed that many at-issue jobs in the present case require the rather unique and necessary "qualification" (to be distinguished from a "skill") of

preseason availability. Plaintiffs' own evidence establishes that plaintiffs were generaly aware of this important qualification. Finally, for the reasons previously stated, this is not a promotion-from-within case.

Having concluded that plaintiffs' statistics have little probative value with respect to the skilled positions, it must be determined whether the strength of the nepotism evidence, absent defendants' rebuttal evidence, together with plaintiffs' evidence of racial comments and individual instances is sufficient to establish, prima facie, a pattern or practice of discriminatory treatment in hiring, promoting, paying, and/or firing. Without the strength of highly probative statistics, plaintiffs' case must largely rise or fall upon the strength of the inference from the evidence of individual instances. The

elements are set forth in McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1973). To establish individual instances of discriminatory treatment, when statistics are insufficient for a prima facie case, generally an individual should show that he belongs to a racial minority, that he applied and was qualified for the position sought, he was rejected, and after the rejection, the employer continues to seek applications. Id. While the McDonnell-Douglas elements are not an "inflexible formulation", Teamsters, 431 U.S. at 358, for determining the elements of a prima facie case or the inference weight to be assigned the collective individual instances, it nevertheless provides some guidance. Here, it is clear that plaintiffs belong to various racial minorities. At this juncture, however, the only evidence of preseason

application, other than oral inquiries, was the February, 1977, written application by Kim Tsuji, a student. She was seeking a summer position. One of the two jobs about which she inquired was generally year around (clerical); the other was unskilled. Ms. Tsuji did not disclose any qualifications on her application.

Oral inquiries to a foreman by anyone interested in a job are not treated as applications in the cannery industry. Plaintiffs appeared to have understood this. Gene Viernes, in his deposition at 18, stated in response to a question about Mr. Viernes' oral inquiries,

> [The foreman] gets bored by hundreds of people everyday, I was treated as one such person.

Not only is it asserted that defendants discriminated in individual instances of filling vacancies, but plaintiffs also seek to buttress their

prima facie case with evidence that various class members were "deterred" from applying for better jobs. Several plaintiffs testified they did not apply for "at-issue" jobs because they believed defendants discriminated. At the outset, it should be noted that the test for purposeful discrimination is whether a defendant in fact discriminates, and not whether class members subjectively believe a defendant discriminates. Lewis v. Tobacco Wkrs. Intern. Union, 577 F.2d 1135, 1143 (4th Cir. 1978). "Basing recovery on that fact is an improper consideration." Id. Nevertheless, under Teamsters, 431 U.S. at 365,

> The ["whites only"] message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices--by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his

> responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups.

Plaintiff's burden at the remedy stage of proving that he would have applied for the job had it not been for an employer's practices is a difficult burden, Id. at 368, and at this junctive, the liability stage, the evidence is insufficient to meet that burden. However, plaintiffs' evidence must nevertheless be considered at this point as a factor buttressing the inference of a pattern of discrimination in plaintiffs' prima facie case.

Accordingly, while significant probative value may not separately be assigned to plaintiffs' statistical evidence, or the testimony regarding individual instances including deterrence, and the evidence of other

circumstances including nepotism, nevertheless if the presentation in these various areas is considered collectively, plaintiffs have raised a marginal inference of discriminatory treatment in hiring, promoting, paying, and firing with respect to the skilled jobs. This court is compelled to conclude, however, that defendants have met their burden of production in showing defendants' motivation was not based upon discriminatory animus. Plaintiffs have not met their ultimate burden of persuasion, and have not established that defendants' conduct was pretextual.

As earlier noted, this court finds defendants labor supply data to be significantly more probative. Under the circumstances of this case, the census data is the most comprehensive source of information correlating race, residence, and occupations in the geographical areas

from which defendants draw their employees. Defendants' statistics which do not utilize plaintiffs' theory of counting "re-hires" have greater probative value under the circumstances of this case. Plaintiffs not only count rehires during successive seasons, but at successive canneries within the same season. Thus, an employee who holds the same job for ten years could be counted twenty times. Relying upon Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1018 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981), plaintiffs maintain that eliminating the rehires narrows the statistical base and allows defendants to perpetuate the results of earlier discrimination. However, in this circuit, as in the Second Circuit (Bethlehem Steel Corp., supra), for the rehire evidence to be probative, it must be established that past discriminatory

hiring practices existed. See Gibson, 543 F.2d at 1268. Indeed, the facts in Grant v. Bethlehem Steel Corp. differed dramatically from those in this case in a number of respects. Of fundamental importance, in Grant it was undisputed that the defendant had a long history of race discrimination in hiring. Id. at 1017. Second, in Grant, plaintiffs submitted evidence that persons who were automatically rehired possessed bad safety records which would have excluded them from rehiring in a merit-based hiring system. Id. at 1018. Such is not the case here. Courts have emphasized that statistics must be free from methodologic problems which undermine the reasonableness of any inference to be drawn from such statistics. Teamsters, 431 U.S. at 340, n.20.

Finally, under the facts of this case, given the high perishability of the

inexperience, and whites hired were paid no more than nonwhites.

The evidence further showed that plaintiffs' oral inquiries were not applications, and the inquiries were generally made of persons without hiring authority. Typically, applications were made too late in the season for the preseason jobs and the applicants were otherwise unavailable due to school schedules or other personal preferences. At this juncture, the court is unable to find a practice of deterrence. The instances of "race labeling", e.g., "Filipino Bunkhouse" were not unique to white speakers, but this terminology was also routinely used by the nonwhites. While such conduct is hardly to be applauded, under the circumstances, it is not persuasive evidence of discriminatory intent. This court is also unable to find that nonwhites were singled out because

of race with respect to rules against fraternization with the women or with respect to "menial" jobs such as grasscutting.

In sum, defendants have met their burden of production, both with statistical and other evidence, and plaintiffs have failed in the burden of persuasion with respect to the skilled at-issue jobs.[2]

HOUSING:

Plaintiffs' evidence of segregated housing showed by a preponderance of evidence facts sufficient to establish a prima facie treatment case. Particularly persuasive was Exhibit 251, a letter dated January 25, 1975 by Hardy Parrish,

2. The 1974 conciliation agreement between the EEOC and CWF, Red Salmon Cannery, and WCP was a negotiated settlement, and not an admission by defendants of liability. The agreement is entitled to little weight. Domingo v. New England Fish Co., 445 F. Supp. 421 n.1 (W.D. WA 1977).

which correspondence is set out in relevant part in Finding No. 148. Defendants' evidence, however, sufficiently dispels the inference that defendants were motivated by discriminatory animus. At the outset, the court would note that while Parrish is presently a cannery superintendent for CWF at Kenai, at the time he wrote the offensive letter, he was a cannery foreman, and therefore, not responsible for company policy. Nor does the evidence otherwise support a finding that Parrish was articulating company policy. In addition, defendants established that workers arriving preseason and staying post-season required better insulated housing. Defendants' further evidence showed that workers are housed departmentally because the various departments worked the same shifts. For example, fishermen necessarily come in

and out of their bunkhouse during the nights. To arrange the housing nondepartmentally results in more workers awakening and preparing to leave for work while others are trying to sleep. Of course, for the reasons stated earlier, the department of cannery workers is predominantly non-white. Thus, the cannery worker housing was predominantly non-white. Defendants' evidence of housing assignment by time of arrival and by crew sufficiently dispels the inference that defendants were motivated by discriminatory animus, and plaintiffs have failed in their ultimate burden of persuasion and of showing pretext.

Were this court to utilize the impact model rather than a treatment model, the same conclusion would be reached. It is not efficient or economically feasible to open all bunkhouses preseason to assign workers

arriving preseason to different housing with a result of maintaining more housing than necessary for longer periods of time. Title VII does not require that a seasonal employer be put to the expense of winterizing summer housing when bunkhouse assignment by date of availability makes such an expense unnecessary. Having found an absence of discriminatory treatment or impact in housing, this court need not reach the question of whether an employer may legitimately "award" or entice with better housing skilled workers who must live on the employment location for a greater length of time than unskilled workers.

MESSING:

Plaintiffs evidence of segregated messing showed by a preponderance of evidence facts sufficient to establish a prima facie treatment case. Defendants' evidence, however, sufficiently dispels

the inference that defendants were motivated by discriminatory animus and plaintiffs have not proved pretext. Local 37 members eat in the Local 37 mess. The quality and quantity of food served in the mess halls is the responsibility of the cook in the mess hall. The complaints about the food generally are attributable to matters of personal taste.

Were this court to utilize the impact model rather than a treatment model, the same conclusion would be reached. Defendants operated under the Local 37 contract which provides for a separate culinary crew for the Local 37 crew. Filipino and Asian persons were "overrepresented" in Local 37. Of course, an employer-union agreement which permits an employer to discriminate is not immune to race discrimination claims. Williams v. Owens-Illinois, Inc.,

665 F.2d 918, 926 (9th Cir. 1982). See, also, General Building Contractors Assoc., Inc. v. Pennsylvania, et al., 102 S. Ct. 3141 73 L. Ed.2d 835 (1982). Nevertheless, as stated above, the testimony was that the few whites in Local 37 ate with the Filipinos in the Local 37 mess, and the culinary crew simply acceded to the wishes of the older workers who preferred the traditional food that was served. Consequently, it was the conduct of the union and not the conduct of defendants which caused the pattern of messing along essentially racial lines.

CONCLUSION

Defendants have not discriminated on the basis of race in the allocation of at-issue unskilled jobs. In addition, defendants did not discriminate in the hiring, firing, promoting, or paying in the at-issue skilled positions.

Similarly, defendants have not discriminated on the basis of race in housing its employees or in feeding these employees.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 31st day of October, 1983.

JUSTIN L. QUACKENBUSH,
United States District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

FRANK ATONIO, et al.,	)	
Plaintiffs,	)	NO. C-74-145M
vs.	)	ORDER CORRECTING "OPINION FOLLOWING NONJURY TRIAL" AND DIRECTING CORRECTION OF "JUDGMENT"
WARDS COVE PACKING COMPANY, INC., et al.,	)	
Defendants.	)	

Defendants request correcting this court's Opinion at Finding 148 (p. 47 at l.17) to list Mr. Parrish's occupation as purchasing agent and to strike the language listing Mr. Parrish's occupation as foreman. The Opinion is corrected by deleting the last two sentences in Finding 148, and by inserting instead, the following language: "At the time of writing this letter, Mr. Parrish was

employed at WCP (Red Salmon) but did not have a specific title." While Mr. Parrish is listed as a purchasing agent on Exhibit A-76 at 1551, according to Mr. Parrish's deposition he was assigned various jobs, without the benefit of a particular job title. See, generally, Ct. Rec. 242 at 5-8. The only testimony concerning his job, is found in Mr. Parrish's deposition. This correction does not alter the court's conclusion at page 70 of the Opinion, that Mr. Parrish was not responsible for company policy.

Finding No. 134 of the Opinion at 43 is corrected to delete "1. Pile driver" from the list of unskilled positions. The only testimony with respect to this position shows the job to be skilled. See Affidavit of Alex W. Brindle at 36, paragraph 142. The job of "pile driver" is the same as the position "pile buck"

which this court found to be skilled. See Opinion at 34, Finding No. 131. The court would also agree Finding 134 bears correcting to the extent defendants did not stipulate to the finding that the positions of apprentice carpenter and carpenter's helper were unskilled. Nevertheless, this court will not disturb its finding that these two positions are unskilled.

The following errors are also noted: At page 2, line 2 "1974" is corrected to "1971". At page 70, line 15, "1975" is corrected to "1971".

Plaintiffs' Motion To Correct The Judgment to add the definition of the certified class is also GRANTED. The Clerk of the Court is directed to modify the Judgment by adding the following paragraph pursuant to Judge McGovern's corrected Order Certifying Class at Ct. Rec. 138, p. 3:

> The plaintiff class in this case is defined as all nonwhites who are now, will be or have been at any time since March 20, 1971 employed by Wards Cove Packing Company, Inc., or Bumble Bee Seafoods Division of Castle & Cooke, Inc., in either company's Alaska fishing or canning operations, or by Columbia Wards Fisheries at its Alitak, Alaska or Ekuk, Alaska fishing or canning operations.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 6th day of December, 1983.

JUSTIN L. QUACKENBUSH,
United States District Judge

Frank ATONIO, Eugene Baclig, Randy del Fierro, Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Robert Morris, Joaquin Arruiza, Barbara Viernes, as administratrix of the estate of Gene Allen Viernes, and all others similarly situated, Plaintiffs-Appellants,

v.

WARDS COVE PACKING COMPANY, INC., Castle & Cooke, Inc., and Columbia Wards Fisheries, Defendants-Appellees.

Nos. 83-4263, 84-3527.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 6, 1985.

Decided Aug. 16, 1985.

Abraham A. Arditi, Northwest Labor & Employment Law Office, Seattle, Wash., for plaintiffs-appellants.

Douglas M. Duncan, Douglas M. Fryer, Seattle, Wash., for defendants-appellees.

Appeal from the United States District Court for the Western District of Washington.

Before CHOY, ANDERSON and TANG, Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

The named plaintiffs in this class action suit are former employees at several salmon canneries in Alaska. They brought this action against their former employers, Wards Cove Packing Company, Inc. ("Wards"), Castle & Cooke, Inc. ("Castle"), and Columbia Wards Fisheries ("Columbia"), charging employment discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The class is defined as all nonwhites who are now, will be, or have been at any time since March 20, 1971, employed at any one of five canneries. The individual canneries under scrutiny are Wards Cove and Red Salmon (operated by Wards), Bumble Bee

(operated by Castle), and Ekuk and Alitak (run by Columbia).

The Title VII claims against Wards and Columbia were dismissed for lack of jurisdiction early in the proceedings. This court affirmed the dismissal as to Columbia, but reversed the decision as to Wards. Atonio v. Wards Cove Packing Co., Inc., 703 F.2d 329 (9th Cir. 1983). On remand, and following a bifurcated liability trial, the district court held for defendants. The class appeals.

BACKGROUND

The five canneries are located in remote and widely separated areas of Alaska. They only operate for a short period each year, during the summer salmon runs. For the remainder of the year they lie vacant. The salmon runs themselves are inherently unpredictable. Due to this fact, the number of canning lines to operate at each facility may vary

from year to year, and in any given year a particular facility may not operate at all. Correspondingly, the number of employees needed to staff a particular cannery in any given year varies with the size of the salmon run. As early and as much as possible each winter, the companies attempt to gauge the size of the anticipated fish run for the upcoming season, and likewise the number of employees that will be needed. In making this assessment, management relies in part on forecasts provided by the Alaska Department of Fish and Game and the Fisheries Research Institute at the University of Washington. Despite these efforts, the actual fish run frequently varies to a considerable degree from the forecasts.

Each year the actual cannery operations begin in May or June, a few weeks before the anticipated fish run,

with a period known as the preseason. Workers are brought in to assemble the canning equipment, repair the facilities from the winter damage, and generally prepare the entire cannery for the onset of the canning season. The district court found that many preseason job positions requie a variety of skills and skill levels, and that there is too little time during the preseason to train unskilled workers for the skilled jobs.

Shortly before the fishing begins, the cannery workers arrive. Cannery workers, who comprise the bulk of the summer work force, are the individuals who staff the actual canning lines. The cannery worker position is unskilled. These workers remain at the cannery as long as the salmon run produces fish to be canned, and they are guaranteed payment for a minimum number of weeks if the run proves to be a short one. In turn, when

the canning is completed, the cannery workers depart and the canneries are disassembled and winterized by postseason workers.

Salmon are extremely perishable and must be processed within a short time after being caught. Since the fish runs themselves are of short duration, cannery operations are often characterized by intense work and long hours. All the while, the Food and Drug Administration monitors the canning process closely, to ensure a safe consumer product. Basically, the canning process proceeds as follows. Independent fishermen catch the salmon and turn them over to company-owned boats called "tenders," which transport the fish from the fishing grounds to the canneries. Once at the cannery, the fish are eviscerated, the eggs pulled, and they are cleaned. Then, operating at a rate of approximately four

cans per second, the salmon are filled into cans. Next, the canned salmon are cooked under precise time/temperature requirements established by the FDA, and the cans are inspected to ensure that proper seals are maintained on the top, bottom and sides.

In addition to the cannery workers, each cannery staffs a variety of job classifications. Machinists and engineers are hired to maintain the smooth and continuous operation of the canning equipment. Quality control personnel conduct the FDA-required inspections and recordkeeping. Tenders are staffed with a crew necessary to operate the vessel. A variety of support personnel are employed to operate the entire cannery community, including, for example, cooks, carpenters, store-keepers, bookkeepers, beach gangs for dock yard labor and construction, etc.

The nature of the industry is such that most of the jobs are seasonal and of short duration. The few employees that can be considered permanent or year-round consist of certain management and office personnel who staff the home offices in Seattle and Astoria, Oregon in the winter, and several machinists, carpenters and tendermen who maintain the winter shipyard in Seattle. The remainder of the employees needed for the summer canning season are hired beginning in the first few months of each year.

Due to the geographical realities, the companies must hire the necessary employees from various area, primarily Alaska and the Pacific Northwest. Nearly all employees are transported to and from the canneries by the companies each year, where they are housed and fed throughout the season. A few Alaska Native employees

are able to reside in villages located near some canneries.

During their tenure, the appellants were primarily employed as cannery workers, the lowest-paid positions at the canneries. Appellants' discrimination complaints center on the fact that nearly all cannery worker positions are filled by nonwhites, while the higher-paying job classifications are predominantly white. This disparity, appellants allege, is due to hiring and promoting practices that allow intentional discrimination and produce a discriminatory impact as well. To illustrate these charges, appellants launched a wide-scale attack on the employee selection methods and the housing and messing practices used by the companies.

Among the practices challenged is the apparent lack of objective qualifications for many job

classifications, and the use of subjective criteria in hiring and promoting. When filling most job positions, the respective hiring officers generally seek to hire the individuals who are, in the hiring officer's opinion, the best for the job. Each different job classification naturally requires the officer to consider the needs peculiar to that job. The district court found that the various job classifications at the cannery are not fungible, and that the most important qualifications for many of them, excluding cannery worker positions, are skill and/or experience. The court also found that the necessary skills are not readily acquirable during the season, primarily due to the time restrictions involved, and that cannery worker jobs do not provide training for other positions. Further, the district court found that preseason availability is a necessary

qualification for many of the positions, but that it is never a requirement for cannery worker jobs.

The appellants also attacked the recruitment of employees for different jobs through separate channels. The great majority of cannery workers are hired from native villages in Alaska and through a primarily Filipino ILWU local in Seattle. Consequently, the cannery worker department is staffed almost entirely by these ethnic groups. Openings in other positions are not posted at the canneries, and the companies do not promote from within during the season. Instead, the companies fill other positions each year through applications received during the off-season at the mainland home offices, through re-hiring previous employees in those positions, and through word-of-mouth recruitment. Appellants also

allege that nepotism is rampant in the canneries, with relatives of white company employees being given preference in hiring. Finally, appellants allege that nonwhites are segregated from whites in housing and messing, and that that bunkhouses and food provided for the nonwhites is far inferior to that provided for whites.

In holding for the defendant companies, the district court evaluated the mass of evidence introduced by both sides, including conflicting statistical data. The court analyzed all of appellants' claims for intentional discrimination, concluding that the companies had successfully shown nondiscriminatory motivations. The court refused, despite appellants' arguments to the contrary, to evaluate all of the claims under the disparate impact model of Title VII, relying on authority from

this circuit. A few claims were subjected to disparate impact scrutiny, however, and the court again found for the defendants. Before this court, the appellants challenge these findings and raise a host of subsidiary issues.

ANALYSIS

I. Columbia Joint Venture Claims

[1] Wards and Castle operate Columbia as a joint venture. Earlier in these proceedings, we affirmed the dismissal of Title VII claims against Columbia because they were not filed within the prescribed time limits and were, therefore, time-barred. See Atonio v. Wards Cove Packing Co., Inc., 703 F.2d 329, 332 (9th Cir. 1983). Appellants now assert that dismissal of the claims against the joint venture for procedural reasons does not affect the liability of the joint venturers as to those claims. Therefore, argue

appellants, because they could have sued either or both of the joint venturers without suing the joint venture, the Title VII claims against Columbia can be asserted against Wards and Castle, both of which were timely sued on separate discrimination charges.

We have no trouble agreeing that general common law agency principles, including joint and several liability, are applicable in Title VII cases. So too, however, are basic procedural and jurisdictional principles applicable. The controlling fact here, which appellants ignore, is that the Title VII claims against Columbia were not filed in time to grant jurisdiction. Nor were they ever filed against Wards or Castle in their capacity as joint venturers for Columbia. The claims were properly dismissed as untimely, and they simply no longer exist. Appellants cannot now

evade the jurisdictional prerequisites by bringing these claims in through the back door.

II. Intentional Discrimination

[2, 3] The district court correctly recognized that while a plaintiff suing under section 1981 must always prove intentional discrimination, such is not always the case with Title VII. Of the two Title VII theories of liability, only disparate treatment requires a showing of intentional discrimination in order to establish a prima facie case. The alternate theory, disparate impact, requires no proof of intent and, logically enough, good intent is not a defense in impact cases.

[4] Due to their inherent similarities, we can treat section 1981 and Title VII disparate treatment under one intentional discrimination analysis. The plaintiff in such a case has the

initial burden of proving a prima facie case of intentional discrimination. If successful, the burden of production then shifts to the defendant to articulate some legitimate nondiscriminatory reason for the plaintiff's rejection. If the defendant carries this burden, the plaintiff can still prove by a preponderance of the evidence that the legitimate reasons offered were a pretext for discrimination. The plaintiff always has the burden of persuasion. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-256, 101 S.Ct. 1089, 1093-1095, 67 L.Ed.2d 207, 215-217 (1981); Kimbrough v. Sec. of U.S. Air Force, 764 F.2d 1279, 1283 (9th Cir. 1985). In practical application, this allocation of burdens works to the effect that "after plaintiff's prima facie case and defendant's 'articulation,' the trier of fact decides the question of

discrimination based on the entire case." Kimbrough, at 1283.

[5] "After a Title VII case is fully tried, we review the decision under the clearly erroneous standard applicable to factual determinations." Kimbrough, at 1281; Anderson v. Bessemer City, ___ U.S. ___, ___, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985). The "'district court must decide which party's explanation of the employer's motivation it believes.' We will reverse that factual determination only if it is clearly erroneous . . . and we will not ransack the record, searching for mistakes." Casillas v. United States Navy, 735 F.2d 338, 342-343 (9th Cir. 1984) (quoting United States Postal Service v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983)).

Before addressing appellants' several allegations of error, it should

be noted that appellants have relied heavily on this circuit's decision in Domingo v. New England Fish Co., 727 F.2d 1429 (9th Cir. 1984), modified, 742 F.2d 520 (1984). Domingo was originally brough as a companion case to the action at bar. Because of pre-trial delays in the instant action, including the earlier appeal, Domingo proceeded to trial and appeal much faster. The facts in Domingo are strikingly similar to the facts at bar, as are the claims of the plaintiffs. Both cases involve racial discrimination charges in the Alaska canning industry. Domingo resulted in a decision in favor of the class, and the present plaintiffs have cited that decision extensively. We do not, however, feel compelled to blindly apply stare decisis. Although the similarities between the cases are striking, the differences between them are far more determinative.

In Domingo, we noted that the liability phase of the trial lasted one and one-half days, with the defendant company not challenging the plaintiffs' statistics nor rebutting the plaintiffs' prima facie case. 727 F.2d at 1433-1434. In essence, the defendants in Domingo did not defend against the allegations of discrimination. Conversely, the defendants at bar are different canning companies and they have defended themselves against these charges vigorously. The liability phase of the trial took twelve days, with the defense introducing witnesses and statistical evidence contrary to that of the plaintiffs. Taking these important factual differences into consideration, Domingo is entitled to no more or no less precedential value than the many other Ninth Circuit cases in this area of law.

A. Hiring, Promoting, Paying, Firing

[6] When confronting the bevy of evidence below, the district court began its intentional discrimination inquiry by dividing the at-issue (non-cannery worker) jobs into two groups: skilled and unskilled. Both the plaintiffs and defendants had introduced labor-market statistics in an effort to bolster their contentions. For reasons discussed below, the district court rejected plaintiffs' labor-market statistics, while crediting those of defendants. In addition, the plaintiffs introduced comparative statistics, which the court only credited in scrutinizing the unskilled jobs group.

Taking each group in turn, the court first found that the unskilled jobs were fungible, and, thus, comparative statistics were appropriate for use in

establishing a prima facie case of discrimination. Since the comparative statistics showed a pattern of job segregation throughout the cannery work forces, the court found that the plaintiffs had put on a prima facie case with respect to the unskilled jobs. Nevertheless, for reasons discussed below, the court found that defendants had met their burden of production in showing motivation other than discriminatory animus, and that plaintiffs had failed in their ultimate burden of proving pretext.

Moving on to the skilled positions, the district court had more difficulty in finding a prima facie case of intentional discrimination, because the plaintiffs' statistical evidence had been discredited. The court did find a "marginal" prima facie case, but only by way of combining all of plaintiffs'

evidence and claims of nepotism, individual instances of alleged discrimination, deterrence, failure to post openings, general lack of objective qualifications, lack of a formal promotion procedure, re-hiring past employees in their old jobs, and the discredited statistical evidence. The court found that none of these had significant probative value when considered alone. In conclusion, the court held that defendants had met their burden of production and that plaintiffs had failed to meet their ultimate burden of persuasion.

Appellants contend that the district court erred in npt giving more credit to their evidence of nepotism. The district court noted that "[r]elatives of whites and particularly nonwhites appear in high incidence at the canneries. However, defendants have established that the

relatives hired in at-issue jobs were highly qualified for the positions in which they were hired and were chosen because of their qualifications." The court also found that plaintiffs' statistics failed to recognize that a number of persons became related through marriage after starting work at the canneries, and that the testimony showed "that numerous white persons who 'knew' someone were not hired due to inexperience, and whites hired were paid no more than non-whites." Therefore, the court concluded that there existed no "preference" for relatives at the canneries.[1]

[7] After carefully reviewing the record, we cannot say that the district court was clearly erroneous in making

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1. The district court's analysis of appellants' nepotism claims applies equally under both the disparate impact and intentional discrimination inquiries. Disparate impact is discussed infra.

these findings. The Supreme Court has recently reierated our role in reviewing these findings of fact. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. Bessemer City, ___ U.S. at ___, 105 S.Ct. at 1512, 84 L.Ed.2d at 528 (emphasis added). The fact finder's account of the evidence, concluding that there were legitimate and nonpreferential reasons for the hires of friends and relatives, is entirely plausible in light of the whole record. Consequently, we will not disturb it.

For the same reasons, we will not overturn the district court's findings with respect to alleged individual instances of discrimination. A number of plaintiffs alleged that they were either overtly discriminated against in the hiring for at-issue positions, or that they were deterred from seeking at-issue positions because of the defendants' alleged history of pervasive discrimination. Using the four-part test of McDonnell Douglas as a guideline,[2] the

2. It was set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668, 677 (1973), that a plaintiff can establish an inference of discrimination by meeting four criteria. First, that the individual belongs to a Title VII protected class. Second, that he or she applied and was qualified for an open position. Third, that he or she was rejected. Finally, that after the rejection, the employer continued to seek applicants. See also Diaz v. American Telephone & Telegraph, 752 F.2d 1356 (9th Cir. 1985).

Appellants accuse the district court of misapplying the test, by using it too stringently. They are incorrect,

district court did not give greater credit to the alleged instances because it found that the respective plaintiffs had not been hired for nondiscriminatory reasons. Primarily, the district court found that the individuals had made oral inquiries, which were not considered applications, or that the applications were untimely.[3] The court also found that

apparently due to a misreading of the court's opinion. Contrary to the accusation, the court clearly said that the McDonnell Douglas elements are not an inflexible formulation, but rather provide some guidance.

3. Applications could be untimely if made too early or too late. Testimony showed that some plaintiffs had orally inquired during one season about positions for the next season a year away, and such inquiries were not considered an application unless followed up by a written application to the home office during the winter. Conversely, because the companies generally received far more applications than there were job vacancies, an application was untimely if received after the opening was filled. The district court found that the defendants did not treat whites and nonwhites differently in these respects.

some applicants had been unavailable for preseason work and, therefore, unavailable for the positions they desired. There is ample evidence in the record to support the district court's findings regarding these individual claims.

Nevertheless, appellants argue that the fact that the companies use separate hiring channels, word-of-mouth recruitment, and fail to announce vacancies should serve to excuse appellants from the necessity of establishing the timeliness of their applications and automatically elevate oral inquiries to the status of applications. We disagree. Appellants take this idea from a discussion of damages issues in Domingo. 727 F.2d at 1445. We find that discussion inapposite because, unlike the Domingo plaintiffs, the appellants have not first established

wide-ranging discrimination. Appellants failed to convince the district court that they had been intentionally discriminated against, and they may not rely on Domingo in this manner to establish what they have failed to prove. We cannot find the district court clearly erroneous.

Appellants also contend that the district court erred in failing to credit their comparative statistics when analyzing the skilled positions. As previously indicated, the district court accorded these statistics, which compare the racial composition of the various job categories, little probative value because they did not reflect the number of employees possessing the requisite skills or those available for preseason work.

[8] This court has recognized the importance of statistics as circumstantial evidence of discriminatory

intent. In the same breath, however, the court often admonishes that statistics are "inherently slippery" and the weight given to them depends on "proper supportive facts and the absence of variables." Spaulding v. University of Washington, 740 F.2d 686, 703 (9th Cir.), cert. denied, ___ U.S. ___, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984) (quotations omitted). The district court's evaluation of conflicting statistics and determination of the probative weight they are to be accorded is a factual inquiry. Accordingly, we apply the clearly erroneous standard of review. Gay v. Waiters' and Dairy Lunchmens Union, 694 F.2d 531, 550 (9th Cir. 1982); see also Allen v. Prince George's County, Md., 737 F.2d 1299, 1303 (4th Cir. 1984).

Appellants fail to recognize the importance of minimizing variables to increase the reliability and significance

of statistical evidence. In Domingo, we said that "[i]n many cases, it is necessary to consider the qualifications of the applicant pool because without that information, no inference of discrimination may be drawn; the lack of minority representation in the workforce might simply be due to a lack of qualified applicants." 727 F.2d at 1436. Although we permitted the Domingo district court to credit comparative statistics in that case, it was because sufficient evidence of discriminatory treatment had already been presented, and the statistics were not necessary to raise an inference of discrimination. Id. We allowed them merely to demonstrate the consequences of the defendant's already-proven discriminatory hiring practices.

The appellants at bar, however, have not previously presented sufficient evidence of discriminatory intent, and

they desperately need these comparative statistics credited for that very purpose. This is a precise example of the type of putting the cart in front of the horse of which we were wary in Domingo. Appellants cannot use these general, unrefined statistics to meet their burden with respect to skilled positions. This case clearly illustrates why courts and litigants must carefully examine proffered statistics to avoid the distortion of fact that they have the potential to produce.

The percentage of nonwhites employed in the Alaska salmon canning industry during the relevant time period was approximately 50 percent. Of these, approximately 88 percent were Alaska Natives or of Filipino descent. It is undisputed that the racial composition of cannery workers is predominantly nonwhite, and, therefore, those positions

are primarily held by Filipinos and Alaska Natives. We know that this is because four of the canneries, Ekuk excluded, have a contract with Local 37 in Seattle to supply cannery workers, and we know further that Local 37 membership is predominantly Filipino. We also know that the Alaska Native cannery workers primarily come from sparsely populated areas immediately adjacent to four of the canneries.

Yet, the district court found that Filipinos constitute only about 1 percent of the population and labor force in the geographical region from which the canneries draw employees. Further, the district court found that Alaska Natives constitute only a small portion of the overall general population in the section of Alaska where canneries are located, which includes predominantly white city populations. From this comparison, it

could easily be deduced that Alaska Natives and, more particularly, Filipinos are signficantly overrepresented in the cannery worker jobs.

On the other side of the coin, the district court found that the available general labor supply in the relevant geographic area was approximately 90 percent white. And, it is undisputed that the majority of at-issue jobs were held by whites.

With this background in mind, it is obvious that the institutional factors involved tend to distort the racial composition of the work force. Thus, when considering the skilled positions, statistics which merely highlight the segregation of whites and nonwhites between the at-issue and cannery worker jobs, without more, cannot serve to raise an inference that the segregation is attributable to intentional

discrimination against any particular race. They can, as Domingo pointed out, serve to demonstrate the consequences of discriminatory practices which have already been independently established.

When jobs are not fungible, as in this case, statistics must reflect the qualifications of the applicant pool in order to be probative and credible on the discrimination issue. The fact that the qualifications themselves are subjective does not obviate this requirement as a matter of law. In this case, the district court found that the qualifications most needed for the skilled positions were skill and/or experience in performing the respective jobs. Certainly, there is a degree of subjectivity present when an employer chooses the applicant that he or she feels is best qualified. But it is not necessary that plaintiffs' statistics show that they were the best qualified.

It is enough that they reflect the percentage of qualified nonwhites--in this case, those with some skill and/or experience in the desired jobs and who were available to begin work in the preseason. Whether or not such statistics have sufficiently reflected the minimum qualifications actually imposed by the employer so as to raise an inference of intentional discrimination is then a question of fact left for the fact finder. For these reasons, we do not hesitate to find that the district court did not clearly err in assigning appellants' comparative statistics little probative value as to the skilled jobs.

The appellants further allege the district court erroneously held that the labor-market statistics offered by the defendant companies rebutted the appellants' prima facie case of intentional discrimination. The district

court, however, did not so hold. It found defendants' labor-market statistics more probative than those of appellants because appellants' statistics had counted re-hires of employees during successive seasons and at successive canneries within the same season. Important considerations apart from the statistics played a determinative part in the court's conclusion that defendants had met their burden of production. As previously discussed, the court concluded from the evidence that all applicants were evaluated according to job-related criteria, albeit subjectively, and that oral inquiries and untimely applications served to eliminate hopeful employees, including some plaintiffs. Thus, appellants are incorrect in their basic assertion.

We further cannot find the district court clearly erroneous in its findings

concerning job-related criteria. Appellants assert that the criteria were never imposed. The district court found otherwise. In so doing, the court took certain listed job qualifications verbatim from the defendants' pre-trial order. These lists, however, merely supported the court's conclusion that skill and/or experience were the general qualifications looked for in the hiring of employees for the specified jobs. After reviewing the record, we cannot conclude that the district court was clearly erroneous. See Anderson v. Bessemer City, ___ U.S. at ___, 105 S.Ct. at 1510, 84 L.Ed.2d at 527.

[9] Appellants also urge reversal on the ground that the district court's findings failed to address the discriminatory nature of separate hiring channels and word-of-mouth recruitment. We decline to do so. Findings of fact are

adequate if they are explicit enough on the ultimate issues to give this court a clear understanding of the basis of the decision and to enable us to determine the grounds on which the trial court reached its decision. Nicholson v. Board of Educ., etc., 682 F.2d 858, 866 (9th Cir. 1982). See also Barber v. United States, 711 F.2d 128, 130-131 (9th Cir. 1983); United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 856 (9th Cir.) cert. denied, ___ U.S. ___, 104 S.Ct. 193, 78 L.Ed.2d 170 (1983); De Medina v. Reinhardt, 686 F.2d 997, 1011-1012 (D.C. Cir. 1982).

The ultimate fact, that there existed no pattern or practice of discrimination in hiring, promoting, paying and firing, is supported by the numerous subsidiary findings of the district court. Throughout the findings, the court discusses the manner in which

the canneries hire and promote employees. Included are findings about the fact that cannery workers are hired routinely through Local 37, but that skilled positions are filled through individual screening. It would have been convenient had the district court labelled certain findings as addressing "separate hiring channels" and "word-of-mouth" recruitment. It is inconsequential in the end, however, because it is abundantly clear from the district court's opinion that these challenged practices were included in the ultimate finding. The court stated, "regardless of the manner in which a prospective employee came to the attention of the hiring personnel, the person was evaluated according to job related criteria." Thereafter, in concluding the case, the court encompassed all of the claims when it said "defendants did not

discriminate in the hiring, firing, promoting, or paying . . ." The decision of the district court will not be disturbed.

B. Housing

[10] The vast majority of cannery employees live at the canneries during the season in bunkhouses provided by the companies. The appellants claimed that nonwhites, particularly Filipinos, were segregated from whites and placed in inferior bunkhouses because of racial discrimination. The district court found that appellants had established prima facie case of intentional discrimination, but that the defendants' evidence proved nondiscriminatory motivations which the appellants had failed to prove pretextual. Specifically, the court found that the employees were housed by time of arrival and by crew.

The record contains ample evidence to affirm the district court's conclusion. While none of the cannery housing appears to have been luxurious, some bunkhouses were undoubtedly better than others. Testimony showed that workers who arrived at the canneries first, during the colder preseason period, were housed together in the best-insulated buildings. When the cannery workers eventually arrived, they were housed together in the remaining bunkhouses. This system enabled the companies to maintain only the amount of housing needed at any particular time. Furthermore, the workers were housed primarily by crew, thereby minimizing any inconvenience occasioned when different departments worked different shifts. While some mixing of crews did occur, the cannery workers were all housed together,

regardless of race.[4] Based on our review of the record, we do not find the district court clearly erroneous.

C. Messing

[11] Cannery workers were also fed separately from the remainder of the work force. The appellants alleged that this was due to racial discrimination. The district court agreed that they had established a prima facie case of intentional discrimination, but that the defendants had met their burden of production and the appellants had not proved pretext. It is undisputed that the cannery worker mess halls served what is termed as a "traditional" oriental menu.

4. The only exception to this appears to have been the few female cannery workers, who were housed apart from male cannery workers. White female cannery workers were housed with nonwhite female cannery workers, just as white and nonwhite male cannery workers were housed together.

The district court noted that the Local 37 contract provided for a separate culinary crew, and that Filipino and Asian persons dominated the membership in Local 37. Further, the court found that the quality and quantity of food served in the respective mess halls were the responsibility of the respective cooks, and that the older cannery workers preferred the traditional menu, to which the younger workers acceded. The court concluded that complaints about the food were attributable to personal taste, and that the segregated messing arrangement was attributable to the union and not the conduct of defendants. There is support in the record for these findings, and we cannot find them clearly erroneous.

III. Disparate Impact

[12] From the beginning, appellants have insisted that their claims also be analyzed under the disparate impact model

of Title VII. Impact analysis exemplifies the broad prophylactic purpose of Title VII, which is designed to achieve equality of employment opportunities by removing artificial barriers that act as "built-in head winds" against the progress of minority groups. Connecticut v. Teal, 457 U.S. 440, 447-448, 102 S.Ct. 2525, 2530-2531, 73 L.Ed.2d 130, 137-138 (1982); Griggs v. Duke Power Co., 401 U.S. 424, 431-432, 91 S.Ct. 849, 853-854, 28 L.Ed.2d 158, 164-165 (1971). To make out a prima facie impact case, the plaintiff must show a facially neutral employment practice that has a "significantly discriminatory" impact upon a Title VII protected group. Connecticut v. Teal, 457 U.S. at 446, 102 S.Ct. at 2530, 73 L.Ed.2d at 137. It is not necessary to prove discriminatory intent. International Brotherhood of Teamsters v. United States, 431 U.S.

324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396, 415 n. 15 (1977); Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 481 (9th Cir. 1983). The burden of proof then shifts to the defendant to establish that the practice has "a manifest relationship to the employment in question," Griggs, 401 U.S. at 432, 91 S.Ct. at 854, 28 L.Ed.2d at 165, or is justified by a business necessity, Moore, 708 F.2d at 481. "The employer may also rebut the employee's prima facie case by showing the inaccuracy of the employee's statistics." Id. (citing Contreras v. City of Los Angeles, 656 F.2d 1267, 1273 (9th Cir. 1981), cert. denied, 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed.2d 140 (1982)). The plaintiff may still prevail by showing "that the employer was using the practice as a mere pretext for discrimination," Connecticut v. Teal, 457 U.S. at 447, 102 S.Ct. at 2530, 73

L.Ed.2d at 137, "or that the employer's purpose could be served by selection devices with less discriminatory impact," Moore, 708 F.2d at 481 (citing Dothard v. Rawlinson, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786, 797 (1977)).

[13] The district court applied impact analysis to appellants' claims of nepotism,[5] but declined to do so for the balance of appellants' discriminatory hiring and promoting claims. The court noted a conflict in this circuit concerning whether impact analysis is proper in situations where employees are challenging the subjective nature of employment practices. Caught in the

5. The district court also used impact analysis to test an English language requirement and in an alternate holding in favor of defendants on the housing and messing claims. The language requirement finding is not challenged on this appeal, and for reasons discussed infra we will not review the court's impact discussion regarding housing and messing claims.

bind, the district court wisely chose to follow the precedent authority by refusing to use impact analysis across the board. Appellants challenge this legal decision, and we must attempt to resolve the problem de novo.

Griggs v. Duke Power, supra, was the first case to recognize that Title VII outlaws practices that are fair in form, but discriminatory in operation and impact. From this case grew the disparate impact model, challenging employment practices that are neutrally applied (thus making discriminatory intent difficult to prove), but that nevertheless operate to discriminate in effect. Examples of the type of objective, outwardly neutral employment practices clearly susceptible to impact scrutiny are pre-employment tests that adversely affect people of certain cultural backgrounds and pre-selection

requirements such as height and weight restrictions. See Griggs, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); Dothard, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977).

By and large, however, appellants have not challenged a specific facially neutral practice. Rather, appellants have mounted a broad-scale attack against the gamut of defendants' subjective employment practices. We have firmly stated that subjective practices are particularly susceptible to discriminatory abuse and should be closely scrutinized. Kimbrough, at 1284. At the same time, it is certain that subjective practices and decisions are not illegal per se. Id.; Heagney v. University of Washington, 642 F.2d 1157, 1163 (9th Cir. 1981). The gray area of conflicting opinion is whether the close scrutiny of these practices can or should

take the form of a disparate impact analysis.

In Heagney, upon which the district court relied, the plaintiff challenged the University's power to classify certain jobs as "exempt" from state personnel laws, which, in turn, gave the school more discretion in setting salaries. We held that the crux of the complaint was an objection to the lack of well-defined criteria, which could not be equated with practices such as personnel tests or minimum physical requirements. Thus, impact analysis was inappropriate. 642 F.2d at 1163. O'Brien v. Sky Chefs, Inc., 670 F.2d 864 (9th Cir. 1982), followed on the heels of Heagney, and once again held that the lack of well-defined criteria must be challenged under disparate treatment.

The conflict in this circuit arose with the decision in Wang v. Hoffman, 694

F.2d 1146 (9th Cir. 1982), which challenged the manner in which the Army Corps of Engineers hired and promoted employees. Without cite to Heagney or O'Brien, our court applied impact analysis to the plaintiff's claim that the subjective selection process used by the Corps provided inadequate guidelines and could be manipulated in order to eliminate certain candidates. Although a language skills requirement--traditionally subject to impact analysis because it is objective and facially neutral--appeared central to the court's concerns, the discussion reflects a deeper worry that the language requirement was added intentionally to disadvantage the plaintiff. 694 F.2d at 1149. Unfortunately, this speaks to intent, which is irrelevant in impact cases. Nevertheless, Wang seems to support the appellants' arguments at bar.

See also Peters v. Lieuallen, 746 F.2d 1390 (9th Cir. 1984).

In subsequent cases we have recognized the conflict between Heagney and Wang, and expressed opinion without resolving the question. See Moore, 708 F.2d 475 (9th Cir. 1983) (although unnecessary to decision, disparate treatment focus better suited to analysis of subjective decision making). Domingo, 727 F.2d 1429 (9th Cir. 1984) (disparate treatment more appropriate approach because defendant's practices were not facially neutral); Spaulding, 740 F.2d 686 (9th Cir. 1984) (holding impact analysis only applicable to specific, facially neutral policies, rather than a full-scale challenge to an employer's practices, of which lack of well-defined criteria is not facially neutral).

We choose to follow the Heagney line of authority because we believe it to be

the correct view.[6] Without question, employment discrimination is an evil which continues to plague our society and must be battled. Title VII was designed for that purpose, to make race (or sex, etc.) an irrelevant factor in hiring decisions. It must be remembered, however, that the disparate impact model was not explicitly provided for in the statute, but rather was first enunciated in Griggs as a mode of implementing the broad purposes of Title VII. While it has been argued that subsequent congressional actions have served to implicitly ratify the creation of disparate impact,[7] it is

6. Moreover, we agree with the district court. Principled institutional decision-making requires that we adhere to Heagney, the first in line. We believe the other panels acted improperly in ignoring Heagney. It is the law of this circuit by which we are bound until overruled by appropriate en banc proceedings.

7. See Helfand & Pemberton, The Continuing Vitality of Title VII Disprate Impact Analysis, 36 Mercer 939, 944-954 (1985).

no less clear that Congress was concerned about mandating color-blindness with as little intrusion into the free market system as possible. Courts have noted that it was deemed essential that employers remain free to set employment qualifications as they honestly saw fit, so long as those qualifications were not based on race, color, religion, sex, or national origin. See Griggs, 401 U.S. at 436, 91 S.Ct. at 856, 28 L.Ed.2d at 167; Contreras, 656 F.2d at 1277-78.

Presumably, therefore, the disparate impact model was created to challenge those specific, facially-neutral practices that result in a discriminatory impact and that by their nature make intentional discrimination difficult or impossible to prove. Were the facial-neutrality threshold to disappear or be ignored, the distinction between disparate impact and disparate treatment

would diminish and intent would become a largely discarded element. Rather than being an irrelevant factor as envisioned, race (or sex, etc.) could then become an overriding factor in employment decisions. Employers with work forces disproportionate to the minority representation in the labor force could then face the choice of either hiring by quota or defending their selection procedures against Title VII attack. We do not find such a result has been mandated by Congress or through Supreme Court interpretation of Title VII. Therefore, practices and policies such as lack of well-defined criteria, subjective decision making, hiring from different sources or channels, word-of-mouth recruitment, and segregated housing and messing, which are not facially neutral, lend themselves far better to scrutiny for intentional discrimination.

Consequently, we hold that disparate impact analysis was correctly withheld by the district court when considering these claims.[8]

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8. In addition to the conflict within this court, the circuit courts of appeals are split on the applicability of disparate impact analysis to subjective employee selection practices. Those which have applied impact analysis are the Fifth, Sixth, Tenth, Eleventh and D.C. Circuits. See Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc., 690 F.2d 88 (6th Cir. 1982); Lasso v. Woodmen of World Life Ins. Co., Inc., 741 F.2d 1241 (10th Cir. 1984); Williams v. Colorado Springs School Dist., 641 F.2d 835 (10th Cir. 1981); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984). Those circuits which have said they will only apply impact analysis to specified objective employee selection practices include the Fourth, Fifth, Eighth, and Tenth Circuits. See EEOC v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983); Pope v. City of Hickory, 679 F.2d 20 (4th Cir. 1982); Vuyanich v. Republic Nat'l Bank, 723 F.2d 1195 (5th Cir. 1984); Carroll v. Sears, Roebuck & Co., 708 F.2d 183 (5th Cir. 1983); Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608 (5th Cir. 1983); Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982); Talley v. United States Postal Service, 720 F.2d 505 (8th Cir. 1983); Harris v. Ford Motor Co.,

[14] Appellants' nepotism allegations, which we have previously held proper for impact analysis, Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982), cert. denied, ___ U.S. ___, 104 S.Ct. 3533, 82 L.Ed.2d 838 (1984), were properly so considered by the district court. As previously discussed, the court found that no pattern or practice of nepotism existed because there was no preference for relatives. We do not hold those findings to be clearly erroneous. In addition, we find appellants' remaining allegations of error, concerning re-hire preferences and termination of Alaska natives, to be without merit.

Accordingly, for the reasons set out in this opinion, the district court is

AFFIRMED.

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651 F.2d 609 (8th Cir. 1981); Mortensen v. Callaway, 672 F.2d 822 (10th Cir. 1982).

Frank ATONIO, Eugene Baclig, Randy Del Fierro, Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Robert Morris, Joaquin Arruiza, Barbara Viernes, as administratrix of the estate of Gene Allen Viernes, and all others similarly situated, Plaintiffs-Appellants,

v.

WARDS COVE PACKING COMPANY, INC., Castle & Cooke, Inc., and Columbia Wards Fisheries, Defendants-Appellees.

Nos. 83-4263, 84-3527.

United States Court of Appeals,
Ninth Circuit.

Nov. 19, 1985.

Before BROWNING, Chief Judge, GOODWIN, WALLACE, SNEED, KENNEDY, ANDERSON, HUG, TANG, SKOPIL, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, FERGUSON, NELSON, CANBY, BOOCHEVER, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, and BRUNETTI, Circuit Judges.

ORDER

Upon a vote of the majority of the regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Rule 25 of the Rules of the United States Court of Appeals for the Ninth Circuit. The previous three-judge panel assignment 768 F.2d 1120 is withdrawn.

Frank ATONIO, Eugene Baclig, Randy del Fierro, Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Robert Morris, Joaquin Arruiza, Barbara Viernes, as administratrix of the estate of Gene Allen Viernes, and all others similarly situated, Plaintiffs-Appellants,

v.

WARDS COVE PACKING COMPANY, INC., Castle & Cooke, Inc., and Columbia Wards Fisheries, Defendants-Appellees.

Nos. 83-4263, 84-3527.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted En Banc
Feb. 18, 1986

Decided Feb. 23, 1987

Abraham A. Arditi, Seattle, Wash., for plaintiffs-appellants.

Douglas M. Fryer, Seattle, Wash., for defendants-appellees.

Bill Lann Lee, Los Angeles, Cal., Robert E. Williams, Washington, D.C., for amicis curiae.

Appeal from the United States District Court for the Western District of Washington.

Before BROWNING, GOODWIN, WALLACE, SNEED, ANDERSON, HUG, TANG, SCHROEDER, FLETCHER, PREGERSON, and REINHARDT, Circuit Judges.

TANG, Circuit Judge:

We grant en banc review in this Title VII race discrimination case to decide two questions. First, we decide the procedure a panel should follow when faced with an irreconcilable conflict between the holdings of controlling prior decisions of this court. Second, we resolve that irreconcilable conflict, by deciding that disparate impact analysis may be applied to subjective employment practices. The district court declined to apply disparate impace analysis on the authority of Heagney v. University of Washington, 642 F.2d 1157 (9th Cir. 1981)

(practice of hiring without well-defined criteria cannot be subjected to disparate impact analysis) and chose to disregard the later decision in Wang v. Hoffman, 694 F.2d 1146 (9th Cir. 1982) (lack of objective criteria for promotion can be analyzed for disparate impact). The Ninth Circuit panel that heard the appeal from the judgment for the employers in the instant case noted our conflicting decisions but held it was bound by Heagney because it expressed the "correct view" or, alternatively, because it was the decision "first in line." Atonio v. Wards Cove Packing Co., Inc., 768 F.2d 1120, 1132 and n. 6 (9th Cir. 1985), withdrawn, 787 F.2d 462 (9th Cir. 1985).

[1] The panel's approach did not resolve the broader question of how future panels should decide a case controlled by contradictory precedents. We now hold that the appropriate

mechanism for resolving an irreconcilable conflict is an en banc decision. A panel faced with such a conflict must call for en banc review, which the court will normally grant unless the prior decisions cán be distinguished. Despite the "extraordinary" nature of en banc review, United States v. American-Foreign Steamship Corp., 363 U.S. 685, 689, 80 S.Ct. 1336, 1339, 4 L.Ed.2d 1491 (1960), and the general rule that en banc hearings are "not favored," Fed.R.App.P. 35(a), en banc review is proper "when consideration by the full court is necessary to secure or maintain the uniformity of its decisions." Fed.R.App.P. 35(a)(1); see also American-Foreign Steamship, 363 U.S. at 689-90, 80 S.Ct. at 1339-40.

[2] Turning to the substantive question which produced our conflicting prior decisions, we note that this case arises out of the cannery workers'

allegations of both disparate treatment and disparate impact. Thus it affords us the opportunity to refine the analytic tools for the identification and eradication of unlawful discrimination. Specifically, we now determine that disparate impact analysis may be applied to subjective employment practices.

I. BACKGROUND

Former salmon cannery workers brought a class action suit charging three companies with employment discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1982) and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982). The class alleged both disparate treatment and disparate impact claims on behalf of minority persons. It alleged that the pronounced concentration of Asian and Alaska Native employees in the lowest

paying cannery worker and laborer positions and the relative scarcity of such minority employees in the higher paying positions proved disparate treatment of minority people. It also alleged that certain specific employment practices of the companies proved both disparate treatment of and disparate impact on minority people. The cannery workers challenged the companies' use of separate hiring channels for cannery workers from those used for the higher paying, at-issue jobs, as well as word-of-mouth recruitment, nepotism, rehire policies, and the lack of objective job qualifications.

The majority of cannery workers are hired from native villages in Alaska and through a local union of primarily Filipino members of the International Longshoremen's and Warehousemen's Union (ILWU) in Seattle. Consequently, cannery

workers are almost all members of these ethnic groups. All other positions are filled through applications received during the off-season at the mainland home offices, through rehiring previous employees and through word-of-mouth recruitment. These positions are held predominantly by white people. Another challenged practice, of particular relevance in our en banc review of this case, is the apparent lack of objective qualifications for many job classifications, and the resultant use of subjective criteria in hiring and promoting. When filling most job positions, the respective hiring officers generally seek to hire the individuals who are, in the hiring officer's opinion, the best for the job.

In addition to the racial stratification of jobs, the cannery workers complain that even those

nonwhites who obtain positions with the companies are treated differently from whites. They allege that nonwhites are segregated from whites in housing and messing, and that the bunkhouses and food provided for nonwhites are far inferior to those provided for whites.

In holding for the defendant companies, the district court evaluated the evidence introduced by both sides, including conflicting statistical data. The court analyzed all the cannery workers' claims for intentional discrimination, and concluded that the companies had successfully shown nondiscriminatory motivations for their practices. Despite the cannery workers' contrary arguments, the court, relying on Ninth Circuit authority, refused to evaluate all of the claims under the disparate impact model of Title VII. The court subjected a few claims to disparate

impact analysis and again found for the defendants.

II. ANALYSIS

A. Title VII Liability

[3, 4] Section 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2) (1982), provides that:

> It shall be an unlawful employment practice for an employer--
>
> . . .
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

An employee may prove an employer's Title VII liability through a theory of disparate treatment or a theory of disparate impact. Proof of disparate treatment requires a showing that the employer intentionally "treats some

people less favorably than others because of their race, color, religion, sex, or national origin." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854-55 n. 15, 52 L.Ed.2d 396 (1977). An illicit motive may be inferred in an individual discrimination claim when the plaintiff shows he is a member of a protected class who applied for, and failed to get, a job for which he was qualified and which remained open after his rejection. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). An illicit motive may be inferred in a class-wide discrimination claim from a sufficient showing of disparity between the class members and comparably qualified members of the majority group. Segar v. Smith, 738 F.2d 1249, 1265-66 (D.C. Cir. 1984), cert. denied, 471 U.S.

1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985) (citing Teamsters, 431 U.S. at 335 n. 15, 97 S.Ct. at 1854-55 n. 15).

A disparate impact claim challenges "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Teamsters, 431 U.S. at 336 n. 15, 97 S.Ct. at 1854-55 n. 15. Illicit motive is irrelevant because impact analysis is designed to implement Congressional concern with "the consequences of employment practices, not simply the motivation." Griggs v. Duke Power Co., 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971) (emphasis in original). In a class action suit, commonly known as a "pattern or practice" case, plaintiffs typically assert claims both of disparate treatment occasioned by

an employer's practices and of disparate impact produced by those practices. Segar, 738 F.2d at 1266. As the Supreme Court noted in Teamsters, a pattern and practice class action case, "[e]ither theory may, of course, be applied to a particular set of facts." 431 U.S. at 336 n. 15, 97 S.Ct. at 1854-55 n. 15.

B. Impact Analysis in the Ninth Circuit

1. Conflict

Disparate treatment and disparate impact are but two analytic tools which may be used in the appropriate Title VII case to resolve the ultimate question, whether there has been impermissible discrimination by an employer. See, e.g., Goodman v. Lukens Steel Co., 777 F.2d 113, 130 (3d Cir. 1985). Despite the Teamsters language stating that either theory may be applied to a set of facts, courts have not uniformly interpreted the

scope of impact analysis.[1] Differences have arisen from the conflicting views of whether impact analysis can be applied to evaluate employment procedures or

1. The Second, Third, Sixth, Tenth, Eleventh and District of Columbia Circuits apply impact analysis to subjective practices and criteria. See, e.g., Zahorik v. Cornell University, 729 F.2d 85 (2d Cir. 1984); Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir. 1980), cert. denied, 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981); Wilmore v. City of Wilmington, 699 F.2d 667 (3d Cir. 1983); Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc., 690 F.2d 88 (6th Cir. 1982); Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985); Lasso v. Woodmen of World Life Insurance Co., Inc., 741 F.2d 1241 (10th Cir. 1984), cert. denied, 471 U.S. 1099, 105 S.Ct. 2320, 85 L.Ed.2d 839 (1985); Coe v. Yellow Freight System, Inc., 646 F.2d 444 (10th Cir. 1981); Williams v. Colorado Springs School District No. 11, 641 F.2d 835 (10th Cir. 1981); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985). The Fourth Circuit does not apply impact analysis to subjective criteria. See, e.g., E.E.O.C. v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983), rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank, 467 U.S. 867, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984); Pope v. City of Hickory, 679 F.2d 20 (4th Cir. 1982); but see Brown v. Gaston County Dyeing

criteria different from the objective test and diploma requirement scrutinized in the seminal Griggs decision or the height and weight requirements analyzed in Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977).[2]

This circuit has clearly held that subjective practices and decisions are not illegal per se. Heagney v.

Machine Co., 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982, 93 S.Ct. 319, 34 L.Ed.2d 246 (1972); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971). The Fifth, Seventh and Eighth Circuits have reached conflicting results, sometimes applying impact analysis and sometimes refusing to apply it. See, e.g., Page v. U.S. Industries, Inc., 726 F.2d 1038 (5th Cir. 1984); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) (applying impact analysis); contra Bunch v. Bullard, 795 F.2d 384, 394 (5th Cir. 1986); Vuyanich v. Republic National Bank, 723 F.2d 1195 (5th Cir.) cert. denied, 469 U.S. 1073, 105 S.Ct. 567, 83 L.Ed.2d 507 (1984); Pegues v. Mississippi State Employment Service, 699 F.2d 760 (5th Cir.), cert. denied, 464 U.S. 991, 104 S.Ct. 482, 78 L.Ed.2d 679 (1983); Carroll v. Sears Roebuck & Co., 708 F.2d 183 (5th Cir. 1983); Pouncy v. Prudential Insurance Co., 668 F.2d 795 (5th Cir. 1982); Griffin v. Board of Regents, 795 F.2d 1281, 1288-89 and n. 14 (7th Cir. 1986) (refusing to apply impact analysis); contra Clark v. Chrysler Corp., 673 F.2d 921 (7th Cir.) cert. denied, 459 U.S. 873, 103 S.Ct. 161, 74 L.Ed.2d 134 (1982); Talley v. United States Postal Service, 720 F.2d 505 (8th Cir. 1983), cert. denied, 466 U.S. 952, 104 S.Ct. 2155, 80 L.Ed.2d 541 (1984); Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981) (refusing to apply impact analysis); contra Gilbert v. Little Rock, 722 F.2d 1390 (8th Cir. 1983), cert. denied, 466 U.S. 972, 104 S.Ct. 2347, 80 L.Ed.2d 820 (1984).

2. See, e.g., Page v. U.S. Indusries, Inc., 726 F.2d 1038, 1054 (5th Cir. 1984) (applying impact analysis to subjective employment practices in accord with Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) because "promotional systems which depend upon the subjective evaluation and favorable recommendation of immediate supervisors provide a ready vehicle for discrimination."); E.E.O.C. v. Federal Reserve Bank, 698 F.2d 633, 639 (4th Cir. 1983), rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank, 467 U.S. 867, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984) (allegedly discriminatory promotion policies could not be subjected to impact analysis because the subjective criteria did not amount to an "objective standard, applied evenly and automatically" as are a diploma requirement, a test or a minimum height or weight requirement).

University of Washington, 642 F.2d 1157, 1163 (9th Cir. 1981). At the same time, we have stated that subjective practices are particularly susceptible to discriminatory abuse and should be closely scrutinized. Kimbrough v. Secretary of United States Air Force, 764 F.2d 1279, 1284 (9th Cir. 1985); Nanty v. Barrows Co., 660 F.2d 1327, 1334 (9th Cir. 1981). The conflict in our decisions has developed because prior panels have not all agreed that the close scrutiny of subjective practices can or should take the form of a disparate impact analysis.

In Heagney, the plaintiff challenged the University's power to classify certain jobs as "exempt" from state personnel laws, which, in turn, gave the school more discretion in setting salaries. We held that the crux of the complaint was an objection to the lack of well-defined criteria, which could not be

equated with practices such as personnel tests or minimum physical requirements. Thus, although we had previously noted that both treatment and impact analysis may be applied, we held that impact analysis was inappropriate. Heagney, 642 F.2d at 1163. We followed Heagney in O'Brien v. Sky Chefs, 670 F.2d 864, 866 (9th Cir. 1982) and refused to apply impact analysis to an employer's lack of well-defined promotion criteria, noting that the lack of such criteria does not per se cause an adverse impact.

On the other hand, this court has applied impact analysis to subjective criteria in at least two cases. In Wang v. Hoffman, 694 F.2d 1146, 1148 (9th Cir. 1982), which challenged the hiring and promotion policies of the Army Corps of Engineers, the panel held that a promotion system lacking objective criteria could be challenged for its

disparate impact, and in Peters v. Lieuallen, 746 F.2d 1390, 1392 (9th Cir. 1984), the panel held that impact analysis could be applied to subjective criteria used during interviews to screen candidates, but that the plaintiff must show that use of the criteria caused the adverse impact. See also Yartzoff v. Oregon, 745 F.2d 557, 558 (9th Cir. 1984) (impact analysis of subjective promotion criteria appropriate in age discrimination case, but plaintiff failed to offer proof of disparate impact).

In subsequent cases we have recognized the conflict between Heagney and Wang, but felt it unnecessary to resolve the question. See Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 481 (9th Cir. 1983) (noting that "[t]he law in this court is unsettled" stated disparate treatment focus well suited to analysis of subjective decision making);

Spaulding v. University of Washington, 740 F.2d 686, 709 (9th Cir.) (lack of well defined criteria facilitating wage discrimination better presented under disparate treatment model on the authority of Heagney, followed by a "but cf." citation to Wang), cert. denied, 469 U.S. 1036, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984).

2. Resolution

We now hold that disparate impact analysis may be applied to challenge subjective employment practices or criteria provided the plaintiffs have proved a causal connection between those practices and the demonstrated impact on members of a protected class. The three elements of the plaintiffs' prima facie case are that they must (1) show a significant disparate impact on a protected class, (2) identify specific employment practices or selection

criteria and (3) show the causal relationship between the identified practices and the impact. We are persuaded that this holding comports with the express language of the statute, the intent of Congress as revealed in its discussions of the 1972 amendments, the enforcement agencies' interpretation, and the broad prophylactic purposes of Title VII.

3. Rationale

a. Statutory Language

We begin with the observation that Title VII proscribes all forms of employment discrimination. It does so without reference to either objective or subjective practices. Title VII states that it is an unlawful employment practice "to limit, segregate, or classify . . . employees or applicants for employment in any way." 42 U.S.C. § 2000e-2(a)(2) (1982) (emphasis added).

The Supreme Court construed this language as proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Griggs, 401 U.S. at 431, 91 S.Ct. at 853. The Court developed the disparate impact model for proving discrimination in recognition of Congress' intent to remove "artificial, arbitrary, and unnecessary barriers to employment." Id. Although Griggs involved requirements of a high school diploma and an objective test, the opinion did not expressly limit impact analysis to such criteria.

b. Congressic al Intent

There is considerable evidence that Congress endorsed the Griggs decision during discussion of amendments to Title VII in 1972. H.R.Rep. No. 238, 92d Cong., 1st Sess. 19, 24 (1971), reprinted in 1972 U.S. Code Cong. & Ad.News 2137,

2164; S.Rep. No. 415, 92d Cong., 1st Sess. 1, 14-15 (1971); Connecticut v. Teal, 457 U.S. 440, 447 n. 8, 102 S.Ct. 2525, 2531 n. 8, 73 L.Ed.2d 130 (1982); see Helfand and Pemberton, The Continuing Vitality of Title VII Disparate Impact Analysis, 36 Mercer L.Rev. 939, 948-54 (1985). The section-by-section analyses of the 1972 amendments submitted to both houses of Congress expressly stated that in areas not addressed by the amendments, existing case law was intended to continue to govern. 118 Cong. Rec. 7166, 7564 (1972); Teal, 457 U.S. at 447 n. 8, 102 S.Ct. at 2531 n. 8. Thus, although Title VII was not amended specifically to extend disparate impact analysis to subjective practices, decisional law incorporated at that time included not only Griggs, but such cases as United States v. Bethlehem Steel Corp., 446 F.2d 652, 647-58 (2d Cir. 1971), which applied Griggs to invalidate

subjective hiring standards and procedures.

c. Enforcement Agencies' Interpretation

Additional authority for our decisiton to apply the disparate impact model is found in the announcement of the four agencies charged with enforcement of Title VII--the Equal Employment Opportunity Commission, the Office of Personnel Management, the Department of Justice and the Department of Labor--that the law requires application of the disparate impact model to all selection procedures whether subjective or objective. Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985). The Uniform Guidelines on Employee Selection Procedures, adopted in 1978, define the procedures to which impact analysis applies as:

> [a]ny measure, combination of mesures, or procedure used as a basis for any employment

> decision. Selection procedures include the full range of assessment techniques from . . . physical, educational, and work experience requirements through informal or casual interviews.

29 C.F.R. § 1607.16(Q) (1985).

Because the statutory language and legislative history support the administrative interpretation, the guidelines are "entitled to great deference," and can be treated as "expressing the will of Congress." Griggs, 401 U.S. at 434, 91 S.Ct. at 855.

d. Purpose of Title VII

Applying the tool of disparate impact analysis to subjective practices and criteria is necessary to fully implement the prophylactic purpose of Title VII to achieve equal employment opportunity and remove arbitrary and unnecessary barriers which have operated to favor white male employees over others. Teal, 457 U.S. at 451, 102 S.Ct.

at 2532-33; Teamsters, 431 U.S. at 364, 97 S.Ct. at 1869; Griggs, 401 U.S. at 431, 91 S.Ct. at 853. It is essential precisely because such practices will quite often lack any discriminatory animus. Subjective practices can operate as "'built-in headwinds'" for minority groups as readily as can objective criteria, Griggs, 401 U.S. at 432, 91 S.Ct. at 854, and these practices should likewise be exposed and eradicated when they cause adverse impact without proof of a redeeming business necessity. The Supreme Court has not held otherwise.

e. Furnco

There has been considerable discussion about the meaning of Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978). Some courts and commentators suggest the Supreme Court restricted the application of Griggs impact analysis to objective

criteria.[3] The majority of circuits, however, do not subscribe to this reading of Furnco and have applied impact analysis to subjective practices.[4]

The employment practice challenged in Furnco was the refusal to accept jobsite applications for bricklayers to reline blast furnaces with firebrick. Instead, the job superintendent hired only bricklayers he knew were experienced

3. See, e.g., Larson, 3 Employment Discrimination § 76.36 n. 90 (1984 & Supp. Nov. 1985) (collecting cases).

4. See, e.g., Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir. 1980), cert. denied, 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981) (a post Furnco decision in which, on virtually identical facts, the court held that word of mouth hiring should be evaluated as discriminatory treatment and for discriminatory impact. Id. at 1016-17); Bauer v. Bailar, 647 F.2d 1037, 1043 (10th Cir. 1981) ("Subjective hiring and promotion decisions, particularly where made in the absence of specific standards and guidelines[,] may not go unexplained if there is a significantly disproportionate non-selection of members of a [protected] group. . . ."). See also cases cited supra, n. 1.

or who had been recommended by his foremen. Furnco, 438 U.S. at 570, 98 S.Ct. at 2946. In applying the McDonnell Douglas formula of disparate treatment the Court noted the case did not implicate employment tests previously treated in Griggs and Albemarle Paper Co. v. Moody, 422 U.S. 405, 412-13, 95 S.Ct. 2362, 2369-70, 45 L.Ed.2d 280 (1975) (Moody), or particularized physical requirements such as those discussed in Dothard, 433 U.S. at 329, 97 S.Ct. at 2726-27, and that it was not a pattern and practice case as was Teamsters, 431 U.S. at 358, 102 S.Ct. at 1866, Furnco, 438 U.S. at 575 n. 7, 98 S.Ct. at 2948-49 n. 7.

We do not read this footnote to preclude impact analysis of the claims presented in the case at bar. Clearly, the facts giving rise to allegations of discrimination may support a prima facie case of disparate treatment or disparate

impact. See, Teamsters, 431 U.S. at 336 n. 15, 102 S.Ct. at 1854-55 n. 15 ("[e]ither theory may, of course, be applied to a particular set of facts.") In other words, Furnco imposes no limitation on use of impact analysis beyond the restrictions inherent in demonstrating a prima facie case.

The Furnco plaintiffs identified a specific practice, but were unable to prove that the practice had an adverse impact on black bricklayers. 438 U.S. at 571, 98 S.Ct. at 2946. Because they failed to demonstrate disparate impact, they failed to establish a prima facie case of disparate impact, and thus, use of that analytic tool was inappropriate.

[5] In contrast, the plaintiffs in this case content they are consigned to lower paying jobs by a system of racial segregation implemented through a variety of specific employment practices. The

statistics provide evidence of a significant disparate impact and the challenged practices are agreed to cause disparate impact. Thus, these plaintiffs are entitled to the application of impact analysis as an appropriate analytic tool to challenge the discriminatory effect of the companies' practices because they have satisfied the elements of the prima facie case: a significant disparate impact on a protected class, the identification of specific employment practices or selection criteria and a causal relationship between the identified practice and the impact.

f. Logic Supports Impact Analysis

Although the language of the statute and Congressional discussions of Title VII, as well as Supreme Court pronouncements are sufficient authority for the application of disparate impact analysis to subjective employment

practices, we should also note that we are unpersuaded by the defendants' objections to our decision based on appeals to logic or social policy. Defendants argue that there is a logical basis for a distinction between objective and subjective practices and for the correlative categorization of the analysis of the proof of impermissible discrimination. In their view subjective practices are by nature and definition based upon intent and thus should be evaluated only for discriminatory animus. They argue that only objective practices can be evaluated for disparate impact.

We disagree. Subjective practices may well be a covert means to effectuate intentional discrimination, as the defendants point out, but they can also be engendered by a totally benign purpose, or carried on as a matter of routine adherence to past practices whose

original purposes are undiscoverable. Subjective practices are as likely to be neutral in intent as objective ones.[5] If, in fact, the subjective practices are a "covert means" to discriminate intentionally, by definition intent will be difficult to prove. If the practices are the cause of adverse impact, the purposes of Title VII are well-served by advancing proof of adverse impact, thereby obviating the necessity of proving intent. Proof of intent where adverse impact can be shown may be not only unnecessary but undesirable because of the animus the process generates.

We also do not agree that only objective practices can be analyzed for

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5. See D. Baldus and J. Cole, Statistical Proof of Discrimination § 1.23 (1980 & Supp. 1985) ("The logic of the disparate impact doctrine appears to apply to covert legitimate policies, no matter how discretionarily they are applied, as well as it does to overt nondiscretionary criteria.")

disparate impact. When we view employment practices from the perspective of their impact on a protected class, we are unable to see a principled and meaningful difference between objective and subjective practices. There is no bright line distinction between objective and subjective hiring criteria, because almost all criteria necessarily have both subjective and objective elements. For example, while the requirement of a certain test score may appear "objective," the choice of skills to be tested and of the testing instruments to measure them involves "subjective" elements of judgment. Such apparently "subjective" requirements as attractive personal appearance in fact include certain "objective" factors. Thus the terms merely represent extremes on a continuum, and cannot provide a line of demarcation to guide courts in choosing

the appropriate analytic tool in a Title VII discrimination case.

Finally, we think a distinction between subjective and objective practices serves no legitimate purpose. To the contrary, preserving the distinction could serve to encourage employers to abandon "objective" criteria and practices in favor of "subjective" decision making as a means of shielding their practices from judicial scrutiny. It would subvert the purpose of Title VII to create an incentive to abandon efforts to validate objective criteria in favor of purely discretionary hiring methods. See Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985) ("Rather than validate education and other objective criteria, employers could simply take such criteria into account in subjective interviews. . . . It could not have been the intent of Congress to provide

employers with an incentive to use such devices rather than validated objective criteria.").

g. Policy Considerations Support Impact Analysis

The defendants argue that the burden placed on an employer in an impact case is somehow made unduly onerous when the practices identified as having a disparate impact are subjective in nature. A class claim of disparate impact is essentially an allegation that a disparity in the position of nonwhites and whites, often proved through statistical evidence, is "the systemic result of a specific employment practice that cannot be justified as necessary to the employer's business." Segar, 738 F.2d at 1267. As in a disparate treatment claim, the initial burden is on the plaintiffs. To establish a prima facie case of disparate impact, the plaintiffs must prove that a specific business

practice has a "significantly discriminatory impact." Teal, 457 U.S. at 446, 102 S.Ct. at 2530; Dothard, 433 U.S. at 329, 97 S.Ct. at 2726-27. To reiterate, plaintiffs' prima facie case consists of a showing of significant disparate impact on a protected class, caused by specific, identified, employment practices or selection criteria.

[6] Once the plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer. The crucial difference between a treatment and an impact allegation is the intermediate burden on the employer. To rebut the prima facie showing of disparate impact the employer may refute the statistical evidence as in the treatment claim and show that no disparity exists. But if the employer

defends by explaining the reason for the disparity he must do more than articulate that reason. He must prove the job relatedness or business necessity of the practice. Moody, 422 U.S. at 425, 95 S.Ct. at 2375. The Supreme Court's decision in Burdine that the burden of persuasion always stays with the plaintiff in a treatment case expressly preserved the different allocation of burdens in an impact case. The Court stated that it "recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252 n. 5, 101 S.Ct. 1089, 1093 n. 5, 67 L.Ed.2d 207 (1981).

Precisely what the employer must prove will vary with the factors of different job settings, but "[t]he touchstone is business necessity." Griggs, 401 U.S. at 431, 91 S.Ct. at 853. In our view, proving business necessity is no more onerous in a case involving subjective practices than one involving objective practices, because in either case the employer is the person with knowledge of what his practices are and why he uses the methods and criteria he does, as well as the person with superior knowledge of precisely how his employment practices affect employees. See Segar, 738 F.2d at 1271; Pouncy v. Prudential Insurance Co., 668 F.2d 795, 801 (5th Cir. 1982). The burden of proof on the employer is commensurate with the greater burden on the plaintiff to prove impact and to establish the causal connection between the practices and the impact.

Once a challenged practice which causes disparate impact is identified, it does not place an unfair burden to ask an employer to justify the challenged practice.[6] We emphasize that while proving business necessity may be "an arduous task," Bunch v. Bullard, 795 F.2d 384, 393 n. 10 (5th Cir. 1986), this burden will not arise until the plaintiff has shown a causal connection between the challenged practices and the impact on a protected class.

In weighing competing policy considerations urged by the defendants,

6. We note that a related concern is that the "impact model is not the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." Spaulding, 740 F.2d at 707. However, this is not such a case. The class has not simply complained about the overall consequences of a collection of unidentified practices; rather it has identified specific employment practices which cause adverse impact. These specific practices which cause adverse impact may be considered individually and collectively.

primary guidance is provided by the purpose of Title VII, namely to eradicate the existence and effects of discrimination in employment. Treatment and impact analyses are interpretive constructions intended to provide guidance in evaluating the evidence presented in discrimination cases so as best to effectuate Congressional intent. In this case, that intent is best realized by a decision to apply disparate impact analysis to subjective employment practices.

CONCLUSION

For the reasons discussed, we hold that disparate impact analysis can be applied to subjective employment practices. To the extent our prior decisions have held to the contrary they are expressly overruled.

We return this cause to the panel to reconsider the district court's

disposition of the plaintiffs' claims in light of this decision.

SNEED, Circuit Judge, with whom GOODWIN, WALLACE, and J. BLAINE ANDERSON, Circuit Judges, join, concurring separately:

I agree that en banc resolution of a conflict, such as existed with respect to Heagney v. University of Washington, 642 F.2d 1157 (9th Cir. 1981), and Wang v. Hoffman, 694 F.2d 1146 (9th Cir. 1982), is the appropriate means of unraveling a tangle of conflicting holdings in circuit law.

On the other hand, while I agree that the mere fact that an employment practice is subjective does not shield it from attacks under the disparate impact theory, my view of the problems this case presents is different enough from that of the majority that it is best to set forth in some detail both my summary of the

facts and my analysis of the law with respect to those facts. My thesis, in a nutshell, is that the disparate impact theory is designed to be applied to certain types of cases only. The majority opinion, although not holding otherwise, might unfortunately be read to suggest that the disparate treatment and disparate impact theories may be used interchangeably in any given fact situation. While this would read the opinion too broadly, it is certainly fair to say that the majority opinion provides no guidance in describing the circumstances to which each theory is applicable. This guidance is necessary to prevent the conversion of all, or substantially all, Title VII class actions into disparate impact cases.

I now turn to the facts which will be set out somewhat differently than in the majority opinion.

I.

FACTS

The five defendant canneries are located in remote and widely separated areas of Alaska. They operate for a short period each year, during the summer salmon runs, and lie vacant for the remainder of the year.

The cannery operations begin in May or June, a few weeks before the anticipated fish run, with a period known as the preseason. The companies bring in workers to assemble the canning equipment, repair winter damage to the facilities, and prepare the cannery for the onset of the canning season. Shortly before the fishing season, the cannery workers arrive. Cannery workers, who comprise the bulk of the summer work force, generally are unskilled individuals who staff the actual canning lines. These workers remain at the

cannery as long as the salmon run lasts; they are guaranteed payment for a minimum number of weeks if the run is shorter than usual. When the canning is completed, the cannery workers depart and the canneries are disassembled and winterized by post-season workers.

Salmon are extremely perishable and must be processed within a short time after being caught. Because the fish runs are of short duration, cannery work involves intense and long hours. The canning process proceeds as follows. Independent fishermen catch the salmon and turn them over to companyowned boats, which transport the fish from the fishing grounds to the canneries. Cannery workers eviscerate the fish, remove the eggs, clean the fish, and place them in cans. Next, the cannery workers cook the salmon under precise time and temperature requirements established by the Food and

Drug Administration (FDA) and inspect the cans to ensure that proper seals are maintained on the top, bottom, and sides.

Because of their remote location, the canneries must be completely self-contained, employing individuals in a great variety of jobs. Machinists and engineers, for example, maintain the canning equipment. Quality control personnel conduct the FDA-required inspections and record-keeping. Boat crews operate transport boats. Other tasks require, for example, cooks, carpenters, store-keepers, bookkeepers, and beach gangs for dock yard labor and construction. Because of the brevity of the salmon runs, most of the jobs are of short duration. The few permanent employees either staff the home offices in Seattle, Washington and Astoria, Oregon in the winter, or maintain the winter shipyard in Seattle.

Another consequence of the canneries' location in remote areas is that the companies hire the necessary employees from various areas--primarily Alaska and the Pacific Northwest--and transport them to and from the canneries each year. They provide housing and mess halls at the canneries throughout the season.

Most of the cannery worker jobs, which are unskilled, are held by minorities. Most of the higher-paying jobs are held by caucasians. The plaintiffs presented statistical evidence demonstrating the breadth of this disparity. Relying on this evidence, they challenged the following hiring practices the canneries use in filling the higher-paying jobs at issue: (1) the use of separate hiring channels and word-of-mouth recruitment for skilled workers; (2) nepotism; (3) rehire policies; and

(4) the lack of objective job qualifications. They also alleged racial discrimination in the canneries' messing and housing practices.

The district court evaluated all of the practices under the disparate treatment model; it found for the defendants, holding that they had shown nondiscriminatory motivations for these practices. It also evaluated some of the practices, those it characterized as "objective," under the disparate impact model; it found for the defendants under this analysis also.

The panel to which this case was assigned agreed with the district court that disparate impact analysis should be applied only to "objective" factors. Its conclusion was based on Heagney v. University of Washington, 642 F.2d 1157 (9th Cir. 1981), but conflicted with Wang v. Hoffman, 694 F.2d 1146 (9th Cir.

1982). See Atonio v. Wards Cove Packing Co., 763 F.2d 1120, 1132 & n. 6 (9th Cir. 1985).

As already mentioned, we granted en banc review to address the circumstances under which it is appropriate to employ the disparate impact analysis. Part II of this opinion sets forth an analytic framework for determining when the disparate impact approach should be used. Part III applies that framework to the facts of this case.

II.

ANALYTIC FRAMEWORK

The relevant section of Title VII, 42 U.S.C. § 2000e-2(a)(2), provides:

> It shall be an unlawful employment practice for an employer
>
> . . . .
> . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

> status as an employee, because of such individual's race, color, religion, sex, or national origin.

The Supreme Court's interpretation of this provision has identified two separate theories of recovery: disparate treatment and disparate impact. Put briefly, a plaintiff alleging disparate treatment must demonstrate intentional discrimination. See, e.g., International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854-55 n. 15, 52 L.Ed.2d 396 (1977). A disparate impact claim, on the other hand, does not require proof of discriminatory intent. Instead, it attacks "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another." Id. at 336 n. 15.

The Supreme Court has not clearly articulated the types of cases to which

each of these theories should be applied. In Teamsters, for example, the Court said that "[e]ither theory may, of course, be applied to a particular set of facts." Id. One could conclude from this comment that both theories were applicable to all Title VII claims without regard to their specific nature.

This conclusion, however, is plainly inconsistent with the Supreme Court's disposition of Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978). In that case, the Supreme Court expressly refused to apply disparate impact analysis. The plaintiffs were individual bricklayers who were not hired because they applied at the jobsite, rather than through the regular application process. The Supreme Court's explanation consisted of a footnote stating that the case was not similar to Griggs v. Duke Power Co., 401

U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) (evaluating standardized tests under disparate impact analysis), Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) (evaluating height and weight requirements under disparate impact analysis), or Teamsters (a class action disparate treatment case). See Furnco, 438 U.S. at 575 n. 7, 98 S.Ct. at 2948-49 n. 7.[1]

It should not be surprising that the lower courts have employed different explanations of this footnote in Furnco.

1. Comprehension of the court's treatment of the impact claim in Furnco is complicated by Justice Marshall's explanation. He argues that the Court's rejection of the impact claim was merely an affirmance of the circuit court's affirmance of the district court's rejection of that claim on the merits. 438 U.S. at 584-85, 98 S.Ct. at 2953 (Marshall, J., concurring in part, dissenting in part.) Because this explanation is not consistent with the explanation of the Court's own opinion, I refuse to rely on it.

Two basic explanations have emerged, one represented by Wang and the other by Heagney. The Heagney approach restricts the disparate impact analysis to objective practices; the Wang approach applies it to all practices.[2] I think

2. The decisions in other circuits in fact reflect a more complicated situation, with a variety of different positions. It is fair to say, however, that some courts apply disparate impact analysis only to practices closely akin to the counting, measuring, and weighing evident from the existing Supreme Court cases. See, e.g., Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 188-89 (5th Cir. 1983) (Wisdom, J.) (refusing to apply disparate impact analysis to claims of discrimination in training, promotion, and classification of employees); Harris v. Ford Motor Co., 651 F.2d 609, 611 (8th Cir. 1981) (per curiam) (refusing to apply disparate impact analysis to system allowing firing based on evaluations of supervisors). Other courts apply disparate impact analysis to any identifiable practice whatsoever. See, e.g., Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 92-93 (6th Cir. 1982) (per curiam) (applying disparate impact analysis to system allowing rehiring based on opinions of foremen); Clark v. Chrysler Corp., 673 F.2d 921, 927 (7th Cir.) (applying disparate impact analysis to word-of-mouth recruitment and discriminatory selection of hiring channel), cert.

both of these approaches ignore how the alleged practice functions. As a consequence, one is too broad and the other too narrow.

Moreover, the distinction between "objective" and "subjective" employment practices or criteria is not as clear as these cases suggest. A requirement, for example, that an applicant pass a qualifications test is "objective." On the other hand, hiring on the basis of good looks and appearance is by no means entirely "subjective." Specific aspects of these two criteria can be identified and to the extent so identified become "objective." Only an employment practice resting entirely on personal whim and caprice can be said to be wholly "subjective." In short, "subjective" and "objective" are only the extremes of a continuum, like night and day. I believe

denied, 459 U.S. 873, 103 S.Ct. 161, 74 L.Ed.2d 134 (1982).

they are inappropriate tools for defining the bounds of disparate impact and disparate treatment analysis. Moreover, even "subjective" practices, as the majority points out, have the same capacity to cloak discrimination that in Griggs led the Supreme Court to create disparate impact analysis.

I think the key to understanding the proper spheres of disparate impact and disparate treatment analysis is found in the nature of the claims of discrimination. A brief recapitulation of the nature of the two forms of analysis demonstrates this point. To establish a prima facie disparate impact case requires that the practice be identified, that there exists an impact adverse to a protected class, and that the practice caused the adverse impact.

Obviously, the burden of establishing this prima facie case will

preclude certain claims from receiving disparate impact analysis. For example, the requirement that the plaintiffs identify a specific practice prevents plaintiffs from "launch[ing] a wide ranging attack on the cumulative effect of a company's employment practices." Spaulding v. University of Washington, 740 F.2d 686, 707 (9th Cir.) (quoting Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 800 (5th Cir. 1982)), cert. denied, 469 U.S. 1036, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984). But cf. Griffin v. Carlin, 755 F.2d 1516, 1523-25 (11th Cir. 1985) (applying disparate impact analysis to the end result of a hiring process, without requiring the plaintiffs to articulate which specific practices caused the impact in question). Absent this requirement, the disparate impact test would put on employers the burden of demonstrating the business necessity of

each facet of their employment decisions, even if the plaintiffs could demonstrate no disparate impact caused by some of those facets. See Pouncy, 668 F.2d at 801. Accordingly, the analysis requires the plaintiff to identify some specific practice; the defendant must show the business necessity of that specific practice.

The requirement of causation also prevents disparate impact analysis of certain claims. For example, a plaintiff's class consisting of children cannot state a cause of action against an employer merely because his recruiting practices designed to obtain quarry workers overlooked children. No significant number of children are qualified to be quarry workers. Because there are not a significant number of children so qualified, the employer's practices in recruiting quarry workers

cannot be said to have caused any impact on the children. At a minimum, then, the causation element requires demonstration by the plaintiff that significant numbers of the plaintiff class are qualified for the job. See, e.g., Segar v. Smith, 738 F.2d 1249, 1274 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985); Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1019 (2d Cir. 1980) (noting that some members of the plaintiff class were clearly qualified, despite the employers' protestations to the contrary), cert. denied, 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981).[3]

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3. I do not mean to say that plaintiffs must introduce statistical proof based on qualifications of applicants who have been rejected for the job. Obviously, the applicant pool itself could fail to represent adequately the number of qualified minorities because of discriminatory recruitment practices. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 330 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786 (1977). Those

Once the plaintiff has established a prima facie case, the employer must either attack one of the three elements of the prima facie case or demonstrate that the practice is a "business necessity." The latter can be shown only when the practice is job-related and serves to help identify the qualities necessary to perform the work satisfactorily. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 333 n. 14,97 S.Ct. 2720, 2728 n. 14, 53 L.Ed.2d 786 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 431 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971).

The disparate treatment structure is quite different. There the prima facie case typically requires that the

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discriminatory recruitment practices themselves are subject to disparate impact analysis. But is is important to remember that a prima facie case that the recruitment practices in question have caused a disparate impact requires demonstration of a significant number of qualified persons overlooked because of the challenged practices.

aggrieved show (1) that he is a member of a protected class, (2) that he applied, (3) that he was rejected, and (4) that after the rejection the position remained open and applicants having qualifications similar to the aggrieved's continued to be accepted. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). The burden then is on the employer to show that a non-discriminatory reason explains his conduct. See id. at 802-03, 93 S.Ct. at 1824-25. Thereafter, the aggrieved may attempt to show that the proffered explanation is pretextual. See id. at 804, 93 S.Ct. at 1825. The ultimate burden of persuasion remains on the aggrieved to show discriminatory treatment. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981).

The Supreme Court cases to date have applied disparate impact analysis only to practices akin to counting, weighing, and measuring, an even narrower limitation than the "objective"/"subjective" distinction some courts have adopted. I think the appropriate distinction can be more accurately delineated. As I see it, disparate impact analysis should be applied whenever the plaintiff claims that the employer has articulated an unnecessary practice that makes the plaintiff's true qualifications irrelevant. This differs from a treatment case, in which the plaintiff claims that, knowing the plaintiff's qualifications, the employer refused to hire him because of race or some other impermissible characteristic. A showing of discriminatory intent is extremely difficult, if not impossible, when an employer asserts that he did not hire an

individual because of a facially neutral requirement. Faced with this reality the Court in Griggs held that employers must justify such requirements under the business necessity test.

The crucial issue in any Title VII case is into which category the employer's alleged wrong properly fits. Has the employer allegedly failed by reason of some facially neutral employment practice to ascertain the qualifications of a protected class, or has the employer ignored the known qualifications for a discriminatory reason? The nature of the wrong as pleaded and proved determines the nature and extent of the plaintif's burden. Because it would be futile in an impact case to require the plaintiff to show discriminatory intent, the plaintiff's burden principally is one of showing the "impact" of the practice. Proof of the

"impact" goes far toward establishing a failure to consider the qualifications of a substantial number of the protected class. At that point the employer's response logically can only be that the practice serves to ascertain a relevant job-related qualification; that is, the practice rests on business necessity.

This burden of showing a business necessity has no place if the plaintiff's grievance is that his qualifications, although available to and known by the defendant employer, have been ignored because of a discriminatory motive. To treat this as an impact case rather than a treatment case would relieve the plaintiff of the burden of establishing a discriminatory intent and impose on the defendant the burden of demonstrating that what he did was done because of business necessity. In the context of a treatment case, this would amount to

imposing the burden on the defendant to prove that he did not discriminate.

Thus, it is necessary to determine from the pleadings and the evidence the nature of each claim the plaintiff makes. Although it is true that neither impact nor treatment analysis can be tied irrevocably to a specific category of practices, it is also true that they properly cannot be employed interchangeably. It follows that in this case each claim must be analyzed to determine which type of analysis, impact or treatment, is proper. An employee, alleging only that the employer's failure to hire him is based on race or religion, cannot force the employer to prove that his failure was due to business necessity. This remains true even if the plaintiff shows that others of plaintiff's race or religion also had not been hired. The employee has alleged a

treatment case and the burdens are allocated as McDonnell Douglas and Burdine indicate. On the other hand, such an allocation is entirely inappropriate where the allegation is that the test employed by the employer disqualifies all applicants other than Protestants. This pleads an impact case.

Complications arise when the practices lend themselves to being alleged as the basis of either a treatment or impact case. Equally complicated are situations in which multiple practices are employed and some properly suggest impact analysis while other treatment analysis. In such situations, a court should evaluate each practice separately, applying the appropriate analysis to each practice. Guided by this analysis, I now proceed to examine the district court's

treatment of the plaintiff's claims in this case.[4]

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4. I acknowledge that this position has not been articulated in the decisions of other courts that have examined similar questions. A brief suvey of the law in other circuits reveals, however, that most of the decisions in this area are consistent with the approach I suggest.

The Second Circuit has applied disparate impact analysis to employment systems that relied on subjective employee evaluations. Zahorik v. Cornell Univ., 729 F.2d 85, 95-96 (2d Cir. 1984). Under my approach, such decisions would often be subject to the disparate impact analysis.

The Third Circuit applied disparate impact to invalidate a test that partially based promotions on administrative skills. In that case, the employer had a practice of assigning whites to jobs that developed the administrative skills tested for by the exam. Accordingly, reliance on the administrative skills was improper. See Wilmore v. City of Wilmington, 699 F.2d 667, 675 (3d Cir. 1983).

None of the Fourth Circuit decisions commonly cited in this area seems to have dealt specifically with the objective/subjective distinction. For instance, in EEOC v. Federal Reserve Bank, 698 F.2d 633, 638-39 (4th Cir. 1983), rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank, 467 U.S. 867, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984), the court flatly stated that disparate impact analysis could be applied only to objective practices. In

III.

APPLICATION TO THIS CASE

A. Separate Hiring Channels and Word-of-Mouth Recruitment

The first practice the plaintiffs challenge is the use of separate hiring

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that case, however, the plaintiffs apparently identified no specific practice; instead, they seem to have been challenging the entire employment process. I would reach the same result, refusing to apply disparate impact unless the plaintiffs can identify a specific practice that causes a disparate impact. Similarly, Pope v. City of Hickory, 679 F.2d 20 (4th Cir. 1982), was a disparate treatment case; the plaintiffs alleged discrimination in general, not that it was implemented through some specific practice. Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982, 93 S.Ct. 319, 34 L.Ed.2d 246 (1972), failed to distinguish between the impact and treatment analysis at all. Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), cert. dismissed pursuant to Sup.Ct.R. 60, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971), is actually precedent for application of disparate impact analysis to more subjective systems, despite the flat statement in EEOC. In Robinson, the Fourth Circuit applied disparate impact to use of a seniority system that was at least partially subjective.

The decisions in the Fifth Circuit display a similar lack of resolution in

channels and word-of-mouth recruitment for cannery workers and for the skilled at-issue jobs. The use of separate hiring channels can insulate an employer's

drawing a line between objective and subjective practices. Several panels of that circuit have thought that the law of the circuit precluded application of the disparate impact analysis to subjective factors, relying on Pouncy v. Prudential Insurance Co. of America, 668 F.2d 795 (5th Cir. 1982). See Vuyanich v. Republic Nat'l Bank, 723 F.2d 1195, 1201-02 (5th Cir.), cert. denied, 469 U.S. 1073, 105 S.Ct. 567, 83 L.Ed.2d 507 (1984); Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 188-89 (5th Cir. 1983) (Wisdom, J.); Pegues v. Mississippi State Employment Serv., 699 F.2d 760, 764 (5th Cir.), cert. denied, 464 U.S. 991, 104 S.Ct. 482, 78 L.Ed.2d 679 (1983). But at least one recent Fifth Circuit panel noted Pouncy and went on to apply disparate impact analysis to a system that based promotions on the subjective evaluations of foremen. See Page v. United States Indus., 726 F.2d 1038, 1045-46 (5th Cir. 1984). The clarity of the ostensible rule of Pouncy is also not evident from that opinion itself. In fact, the opinion had alternative holdings: first, that the plaintiffs had not established that the practices caused the impact; and, second, that the practice was not susceptible to the disparate impact analysis because of its subjectivity. 668 F.2d at 800-01. I also note that in none of the Fifth Circuit cases following Pouncy would plaintiffs

decisionmaking process from any need to consider the qualifications of unwanted minorities. Accordingly, disparate

clearly have prevailed under my disparate impact analysis anyway. See Vuyanich, 723 F.2d at 1201-02 (plaintiff apparently failed to identify a specific practice); Carroll, 708 F.2d at 188-90 (apparently the plaintiffs failed to show causation); Pegues, 699 F.2d at 764-65 (practice not by an employer, but by a state employee commission).

In the Sixth Circuit, disparate impact analysis has been applied in cases challenging rehiring based on unguided opinions of foremen. See Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 92-93 (6th Cir. 1982) (per curiam).

The Seventh Circuit, in a case strikingly similar to this one, applied disparate impact analysis, as I do here, to word-of-mouth recruitment and selection of hiring channels. See Clark v. Chrysler Corp., 673 F.2d 921, 927 (7th Cir.), cert. denied, 459 U.S. 873, 103 S.Ct. 161, 74 L.Ed.2d 134 (1982).

In the Eighth Circuit, I do find cases that are not reconcilable with my approach. That circuit has maintained a firm refusal to apply disparate impact analysis to what it characterizes as "subjective" practices. See, e.g., Gilbert v. Little Rock, 722 F.2d 1390 (8th Cir. 1983) (applying treatment analysis to a system relying on individual discretion), cert. denied, 466 U.S. 972 (1984); Talley v. United States Postal Serv., 720 F.2d 505, 506-07 (8th Cir. 1983) (refusing to apply impact analysis), cert. denied, 466 U.S. 952,

impact analysis of this claim is appropriate.[5]

But this does not mean that Atonio's claim must prevail. As part of his prima

104 S.Ct. 2155, 80 L.Ed.2d 541 (1984); Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981) (per curiam) (same). For the reasons articulated in the text, I think these cases are incorrect. I note that this footnote demonstrates that my approach is consistent with the great majority of existing authority.

The Tenth Circuit has uniformly applied disparate impact analysis to practices that use subjectivity to cloak discrimination. See, e.g., Hawkins v. Bounds, 752 F.2d 500, 503 (10th Cir. 1985); Lasso v. Woodmen of the World Life Ins. Co., 741 F.2d 1241, 1245 (10th Cir. 1984), cert. denied, 471 U.S. 1099, 105 S.Ct. 2320, 85 L.Ed.2d 839 (1985); Coe v. Yellow Freight Sys., 646 F.2d 444, 450-51 (10th Cir. 1981) (dicta); Williams v. Colorado Springs, Colo. School Dist. No. 11, 641 F.2d 835 (10th Cir. 1981).

I have already noted the inconsistency of one recent Eleventh Circuit decision with my opinion. See Griffin v. Carlin, 755 F.2d 1516, 1523-25 (11th Cir. 1985) (applying disparate impact analysis to the end result of a hiring process without requiring the plaintiffs to identify a particular practice). That disagreement as to the requirements of the prima facie case does not extend, however, to the scope of the impact analysis itself. I would apply impact analysis to the facts of Griffin, only reaching a different result.

facie case, he must establish causation. In turn, that element requires proof that a substantial number of the class possess the qualifications legitimately required

Finally, the D.C. Circuit has recently articulated a complicated position, not completely in accord with either of the common positions exhibited in the other circuits. See Segar v. Smith, 738 F.2d 1249, 1270-72 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985). In that opinion, the panel discussed the following scenario. After a plaintiff establishes a prima facie treatment case, defendants frequently advance an employment practice as a legitimate reason for their hiring decisions. According to the Segar panel, the employers' articulation of that practic as a defense to the treatment case establishes a prima facie impact case against the practice in question. Accordingly, the defendants must defend the practice under the business necessity test required by disparate impact analysis.

5. I recognize that this claim is quite similar to the claim presented in Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978), a claim to which the Court refused to apply disparate impact analysis, id. at 575 & n. 7, 98 S.Ct. at 2948-49 & n. 7. In that case, the Court emphasized the "importance of selecting people whose capability has been demonstrated to defendant." Id. at 574, 98 S.Ct. at 2948

for the skilled jobs. The district court did not make any findings on this point. Because the record is unclear, I would remand for further factfinding on this point. See Icicle Seafoods, Inc. v. Worthington, ___ U.S. ___, 106 S.Ct. 1527, 1530, 89 L.Ed.2d 739 (1986). For each job that the district court finds a substantial number of qualified plaintiffs, the district court must evaluate the business necessity of separate hiring channels.

B. Nepotism

The second hiring practice the employees challenge is nepotism. The

(quoting the lower court opinion). If this were treated as a job qualification, under my analysis the impact analysis would apply, but the plaintiffs would have failed to establish a prima facie case because they were not qualified. Most importantly, however, the Furnco footnote is just not specific enough to resolve the question before us. I do not think it is useful to search at length for an explanation for the Furnco result the Court declined to give us.

district court subjected this claim to impact analysis pursuant to our decision in Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1303-04 (9th Cir. 1983), cert. denied, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 838 (1984). It rejected the claim, finding that the individuals were hired because of their abilities rather than their relation to the employers. Excerpt of Record (E.R.) at 324-25. I might construe this as a finding that the canneries had no practice of nepotism, apart from their admitted practice of word-of-mouth recruitment. If this were so, the plaintiffs' challenge would fail. Because the appropriate legal standard was less than clear at the time the district court considered this case, I would remand this claim back to that court for further consideration.

C. Rehire Policies

The third practice the employees challenge is the rehire policies of the employers. Like the practices discussed above, rehire policies insulate the employer from the need to consider the applications of possibly qualified minorities. The district court properly applied disparate impact analysis to this practice, but rejected the employees' challenge because it found the practice was justified by business necessity, viz. the short season and the dangers of the industry. E.R. at 334. Because this finding is not clearly erroneous, I would affirm the district court's disposition of this claim without addressing other aspects of it.

D. Lack of Objective Employment Criteria

Next, the employees challenge the employers' lack of objective employment criteria. The district court found as a

fact that the employers did have objective criteria. The defendants' pretrial order listed a number of qualifications assertedly necessary for the jobs in question. After hearing evidence, the court explicitly found that these qualifications were "reasonably required for successful performance." E.R. at 299. Although some evidence in the record suggests that these qualifications were not applied evenhandedly, discrimination in application raises a treatment claim. It is only the choice of qualifications that is subject to disparate impact analysis. I cannot say that the district court's decision was clearly erroneous. Accordingly, I would affirm its disposition of this claim.

E. Housing and Messing Practices

Finally, the employees allege racial discrimination in the canneries' housing

and messing practices. I do not think this claim is properly susceptible to disparate impact analysis. In no way do these practices enable an employer to reject prospective minority employees without considering their qualifications. The only Title VII challenge to these practices can be under the disparate treatment theory. The district court's rejection of the claim on that theory, E.R. at 336-37, was not clearly erroneous. Accordingly, I would affirm the district court's treatment of this claim.

In summary, I would affirm the district court's dismissal of the plaintiffs' claims regarding rehire policies, subjective employment criteria, and racial discrimination in housing and messing practices. I would reverse the district court's dismissal of the separate hiring channels and nepotism

claims and would remand for further factfinding.

Frank ATONIO, Eugene Baclig, Randy del Fierro, Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Robert Morris, Joaquin Arruiza, Barbara Viernes, as administratrix of the estate of Gene Allen Viernes, and all others similarly situated, Plaintiffs-Appellants,

v.

WARDS COVE PACKING COMPANY, INC., Castle & Cooke, Inc., and Columbia Wards Fisheries, Defendants-Appellees.

Nos. 83-4263, 84-3527.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 18, 1986.

En Banc Opionion Feb. 23, 1987.

Decided Sept. 2, 1987.

Abraham A. Arditi, Seattle, Wash., for plaintiffs-appellants.

Douglas M. Fryer, Douglas M. Duncan, Seattle, Wash., for defendants-appellees.

Bill Lann Lee, Los Angeles, Cal., and Robert Williams, Washington, D.C., for amicis curiae.

Appeal from the United States District Court for the Western District of Washington.

Before CHOY, ANDERSON, and TANG, Circuit Judges.

TANG, Circuit Judge:

I.

Former salmon cannery workers sued their employers for discrimination on the basis of race, advancing both disparate treatment and disparate impact claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The district court declined to apply disparate impact analysis to certain subjective employment practices and this panel affirmed that decision. Atonio v. Wards Cove Packing Co., 768 F.2d 1120, 1132 & n. 6 (9th Cir. 1985), withdrawn, 787 F.2d 462 (9th Cir. 1985). An en banc panel decided that "disparate

impact analysis may be applied to challenge subjective employment practices or criteria provided the plaintiffs have proved a causal connection between those practices and the demonstrated impact on members of a protected class." Atonio, 810 F.2d 1477, 1482 (9th Cir. 1987) (en banc). The en banc panel returned the cause to this panel to reconsider the district court's disposition of the plaintiffs' claims. Id. at 1486.

In our prior decisions we have presented the factual background of this case in considerable detail, and we will not repeat it here. See Atonio, 768 F.2d at 1122-24. We have also explained the legal principles governing analysis of Title VII disparate treatment claims. Id. at 1124-31. The en banc panel adopted the rule that disparate impact analysis may be applied to the "subjective" employment practices

challenged in this case, but it did not explain in any detail how the analysis should be applied. See Atonio (en banc), 810 F.2d at 1482. We now provide that explanation, in light of the reasoning and rationale of the en banc panel in adopting impact analysis.

DISPARATE IMPACT ANALYSIS

[1-3] A class claim of disparate impact is essentially an allegation that a disparity in the position of nonwhites and whites, often proved through statistical evidence, is "the systemic result of a specific employment practice that cannot be justified as necessary to the employer's business." Segar v. Smith, 738 F.2d 1249, 1267 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985). The quantity and quality of statistical evidence which will give rise to an inference that the disparity is caused by

the employer's practices is the same as that which will give rise to an inference of discriminatory intent. Id.

The crucial difference between a disparate treatment and a disparate impact allegation is the intermediate burden on the employer. To rebut the prima facie showing of disparate impact the employer may refute the statistical evidence as in the treatment claim and show that no disparity exists. But if the employer defends by explaining the reason for the disparity he must do more than articulate that reason. He must prove the job relatedness or business necessity of the practice. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975). The Supreme Court's decision in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981), that the burden of persuasion

always stays with the plaintiff in a treatment case expressly preserved the different allocation of burdens in an impact case. The Court stated that it "recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." Id. 450 U.S. at 252 n. 5, 101 S.Ct. at 1093 n. 5.

Precisely what the employer must prove will vary with the unique factors of different job settings, but "[t]he touchstone is business necessity." Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). Business necessity of employee selection criteria may be shown by demonstrating that the selection criteria applied are essential to job safety or efficiency, Dothard v. Rawlinson, 433

U.S. 321, 331 n. 14, 97 S.Ct. 2720, 2728 n. 14, 53 L.Ed.2d 786 (1977), or correlated with success on the job. Contreras v. City of Los Angeles, 656 F.2d 1267, 1280 (9th Cir. 1981), cert. denied, 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed.2d 140 (1982). In short, the employer must demonstrate the "manifest relationship" between the challenged practice and job performance. Griggs, 401 U.S. at 432, 91 S.Ct. at 854. Job relatedness is thus the means of proving "business necessity" when the purpose of a criterion is to predict the capacity of particular individuals to perform a job successfully.

When other employment practices are challenged, whose purpose is not to predict successful job performance, business necessity turns on proof of the burden or benefit to the business of the practice under scrutiny. See Schlei and

Grossman, Employment Discrimination Law, 1329 (2d ed. 1983). Business necessity means more than a business purpose. Business necessity requires that a practice "must substantially promote the proficient operation of the business." Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1262 (6th Cir. 1981). See also, Williams v. Colorado Springs School District No. 11, 641 F.2d 835, 842 (10th Cir. 1981) ("The practice must be essential, the purpose compelling."). Accord Crawford v. Western Electric Co., Inc., 745 F.2d 1373 (11th Cir. 1984); Kirby v. Colony Furniture Co., 613 F.2d 696, 705 n. 6 (8th Cir. 1980); Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1389 (5th Cir. 1978), cert. denied, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979); Head v. Timken Roller Bearing Co., 486 F.2d 870, 879 (6th Cir. 1973); Robinson v. Lorillard Corp.,

444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971)

After the employer proves the business necessity of his practices, the plaintiff class has the opportunity to demonstrate that other employment practices or selection devices could serve the employer's needs with a lesser impact on the protected class. Moody, 422 U.S. at 425, 95 S.Ct. at 2375; Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 481 (9th Cir. 1983); Chrisner, 645 F.2d at 1263. Whether the plaintiffs' proposed alternative rebuts, or should prevail over, the employer's proof of the business necessity of the original practice is then the ultimate determination to be made.

APPLICATION OF IMPACT

ANALYSIS

A. Standard of Review

The ultimate finding of no discriminatory intent in a Title VII action is a factual finding that may be overturned on appeal only if it is clearly erroneous. Fed.R.Civ.P. 52(a); Anderson v. City of Bessemer, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985); Pullman Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); Gibbs v. Pierce County Law Enforcement Support Agency, 785 F.2d 1396, 1401 (9th Cir. 1986). See also Kimbrough v. Secretary of the United States Air Force, 764 F.2d 1279, 1281 (9th Cir. 1985) ("After a Title VII case is fully tried, we review the decision under the clearly erroneous standard applicable to factual determination."). Under the clearly erroenous test, this court must

affirm the district court's determination unless "left with the definite and firm conviction that a mistake has been committed." Gibbs, 785 F.2d at 1401 (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)). The "'district court must decide which party's explanation of the employer's motivation it believes.' We will reverse that factual determination only if it is clearly erroneous . . . and we will not ransack the record, searching for mistakes." Casillas v. United States Navy, 735 F.2d 338, 342-343 (9th Cir. 1984) (quoting United States Postal Service Bd. v. Aikens, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983)).

Of course, we review legal questions de novo. United States v. McConney, 728 F.2d 1195, 1201 (9th Cir.) (en banc),

cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). The conclusion a district court reaches about whether a Title VII plaintiff has satisfied the elements of a prima facie case is reviewed de novo. See, e.g., Clady v. Los Angeles County, 770 F.2d 1421, 1427 (9th Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1516, 89 L.Ed.2d 915 (1986); Thorne v. City of El Segundo, 726 F.2d 459, 464 n. 5 (9th Cir. 1983), cert. denied, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984), appeal after remand, 802 F.2d 1131 (9th Cir. 1986); Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531, 540-45 & n. 13 (9th Cir. 1982). We have also suggested, without deciding the question, that the appropriate standard for reviewing the lower court's conclusion at the third stage of a discriminatory treatment case--proving that an employer's proffered explanation

for differential treatment is mere pretext--is also subject to de novo review. Thorne, 726 F.2d at 465 & n. 6.

B. The Class Claims

As the en banc panel emphasized, a class action pattern and practice case is amenable to both treatment and impact analysis. Atonio, 810 F.2d at 1480. In reivewing the district court's resolution of the class claims, our organizational principle is the practices complained of, rather than the mode of proof. But first we discuss the district court's treatment of the statistical evidence offered by both parties.

1. Statistics

[4, 5] Statistical evidence is of critical value in creating an inference of either discriminatory intent or impact. We have recognized the importance of statistics as circumstantial evidence of discriminatory

intent, but have cautioned that the weight given to them depends on "proper supportive facts and the absence of variables." Spaulding v. University of Washington, 740 F.2d 686, 703 (9th Cir.), cert. denied, 469 U.S. 1036, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984), overruled on other grounds, Atonio, 810 F.2d 1477 (en banc). The district court's evaluation of conflicting statistics and determination of the probative weight they are to be accorded is a factual inquiry. Accordingly, we apply the clearly erroneous standard of review. Gay, 694 F.2d at 550; see also Allen v. Prince George's County, Md., 737 F.2d 1299, 1303 (4th Cir. 1984).

The plaintiffs introduced comparative statistics showing the disproportionate concentration of nonwhite persons in the lower paying jobs. In analyzing the evidence of

disparate treatment, the district court began its inquiry by dividing the at-issue (non-cannery worker) jobs into two groups: unskilled and skilled.

Taking each group in turn, the court first found that the unskilled jobs were fungible, and, thus, comparative statistics were appropriate for use in establishing a prima facie case of discrimination. Since the comparative statistics showed a pattern of job segregation throughout the cannery work forces, the court found that the plaintiffs had established a prima facie case with respect to the unskilled jobs.

In considering the skilled positions, the district court had more difficulty in finding a prima facie case of intentional discrimination, because it did not consider plaintiffs' statistical evidence probative. The court concluded that the practice of hiring through

Local 37 had tended to distort the racial composition of the work force. Thus, when considering the skilled positions, the court found that statistics which merely highlight the segregation of whites and nonwhites between the at-issue and cannery worker jobs, without more, could not serve to raise an inference that the segregation is attributable to intentional discrimination against any particular race. Although we accept this finding, we stress that such statistics can serve to demonstrate the consequences of discriminatory practices which have already been independently established. Domingo v. New England Fish Co., 727 F.2d 1429, 1436 (9th Cir.) (per curiam), modified, 742 F.2d 520 (9th Cir. 1984).

The cannery workers contend that the district court erred in failing to credit their comparative statistics when analyzing the skilled positions. The

district court accorded these statistics, comparing the racial composition of the various job categories, little probative value because they did not reflect the number of employees possessing the requisite skills or those available for preseason work. This was error because when job qualifications are themselves at issue, the burden is on the employer to prove that there are no qualified minority people for the at-issue jobs. Kaplan v. International Alliance of Theatrical and Stage Employees, 525 F.2d 1354, 1358 n. 1 (9th Cir. 1975); Wang v. Hoffman, 694 F.2d 1146, 1148 (9th Cir. 1982). Furthermore, it is unrealistic to expect statistics to be calibrated to reflect preseason availability when the preseason starts only one month earlier than the season.

The comparative statistics offered by the cannery workers are sufficient to

support an inference of discrimination in hiring practices both as to unskilled and skilled jobs. While the district court discounted the comparative statistics in evaluating the claim of intentional discrimination in skilled jobs we find them sufficiently probative of adverse impact. The statistics show only racial stratification by job category. This is sufficient to raise an inference that some practice or combination of practices has caused the distribution of employees by race and to place the burden on the employer to justify the business necessity of the practices identified by the plaintiffs. As the court stated in Domingo, comparative statistics demonstrate "the consequences of . . . discriminatory hiring practices." 727 F.2d at 1436.

Thus, in this case, because the comparative statistics support an

inference of discriminatory impact, and because the cannery workers have identified certain practices which cause that impact, it is incumbent on the district court to evaluate the business necessity of the practices. Of course, it is also essential that the practices identified by the cannery workers be linked causally with the demonstrated adverse impact.

2. Employment Practices

a. Nepotism

[6] The cannery workers contend that the district court erred in not giving more credit to their evidence of nepotism. The district court noted that "[r]elatives of whites and particularly (sic) nonwhites appear in high incidence at the canneries. However, defendants have established that the relatives hired in at-issue jobs were highly qualified for the positions in which they were hired

and were chosen because of their qualifications." The court also found that plaintiffs' statistics failed to recognize that a number of persons became related through marriage after starting work at the canneries, and that the testimony showed "that numerous white persons who 'knew' someone were not hired due to inexperience, and whites hired were paid no more than nonwhites." Therefore, the court concluded that there existed no "preference" for relatives at the canneries.

The district court subjected the cannery workers' nepotism allegations to impact analysis, in accordance with Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982), cert. denied, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 838 (1984). We think the district court may have missed the point of Bonilla in evaluating nepotism at these canneries.

If nepotism exists, it is by definition a practice of giving preference to relatives, and where those doing the hiring are predominantly white, the practice necessarily has an adverse impact on nonwhites. Id. at 1303. The evidence shows that of 349 nepotistic hires in four upper-level departments during 1970-75, 332 were of whites, 17 of nonwhites. That the court found individuals were hired for their skills and not because they were relatives serves to dispel the inference of discriminatory intent but it does not meet the defendants' burden in refuting a claim of disparate impact. What is required is that the defendants prove the business necessity of the nepotism policy. Id.; Contreras, 656 F.2d at 1275-80. As we said in Bonilla, generally "nepotistic concerns cannot supersede the

nation's paramount goal of equal opportunity for all." 697 F.2d at 1303.

b. Subjective Criteria

[7] A crucial aspect of the cannery workers' treatment claim was the alleged absence of job criteria and the latitude it allowed for subjective decision making. Courts recognize that subjective criteria are ready mechanisms for discrimination. See, e.g., EEOC v. Inland Marine Industries, 729 F.2d 1229, 1236 (9th Cir.), cert. denied, 469 U.S. 855, 105 S.Ct. 180, 83 L.Ed.2d 114 (1984); Domingo, 727 F.2d at 1436 n. 3. In evaluating a claim of disparate treatment, subjective criteria are suspect because they may mask the influence of impermissible racial bias in making hiring decisions. The district court considered the claim that there were no objective job criteria but found that there were in fact objective

criteria. It adopted verbatim from the defendants' pretrial order a list of qualifications which it found "reasonably required for successful performance" of a number of jobs. Opinion at 34. It did not, however, find that these specific criteria were actually applied by those who made hiring decisions, and at one point noted the "general lack of objective job qualifications." Opinion at 60. The court said people were evaluated according to job-related criteria, but in context that statement apparently meant only that the general criteria of experience and skills were considered but subjectively evaluated by hiring officials. Thus the lists merely supported the conclusion that skill and/or experience were the general qualifications looked for in the hiring of employees for the specified jobs. The court also found that the necessary

skills are not readily acquirable during the season, primarily due to the time restrictions involved, and that cannery worker jobs do not provide training for other positions. Further, the district court found that preseason availability is a necessary qualification for many of the positions, but that it is never a requirement for cannery worker jobs. While these findings are not clearly erroneous, and may serve to defeat the inference of discriminatory animus, they do not support a finding that there was no disparate impact occasioned by this practice.

The cannery workers allege that the lack of objective job qualifications and the consequent hiring on the basis of subjective evaluations has an adverse impact on nonwhites in the canning industry. The companies concede the causal relation between their hiring

criteria and the number of nonwhites in the at-issue jobs, but argue that there are objective qualifications which differentiate among potential employees in such a way that there are no qualified nonwhites for the at-issue jobs. The district court, as discussed, found there were qualifications for the jobs, including specific skills and experience. We think the court must analyze whether these qualifications were actually applied in a non-discriminatory manner. The Supreme Court has held that only "non-discriminatory standards actually applied" by employers are pertinent in a discrimination case." Franks v. Bowman Transportation Co., 424 U.S. 747, 773 n. 32, 96 S.Ct. 1251, 1268 n. 32, 47 L.Ed.2d 444 (1976) (emphasis in original). There is anecdotal evidence which suggests that these criteria were not applied. For example, the district

court found that reasonable qualifications for a dry tender engineer included "one year of related boat experience or six months engine mechanical experience and one season of tender experience." But one dry tender engineer, who was a relative of a company home office employee, had had no mechanical experience or training other than performing preventive maintenance on his car, and no experience working on a boat.

More importantly, the court must bear in mind that where qualifications are at issue, the burden is on the employer to prove the lack of qualified people in the nonwhite group. Kaplan, 525 F.2d at 1358 n. 1. As we said in Wang, 694 F.2d at 1148, "[h]e cannot be required to prove that he qualified for promotions under a system he alleges to be discriminatory unless the legitimacy of

the system is first established." Finally, and most importantly, the court must make findings as to the job-relatedness of the criteria actually applied.

c. Separate Hiring Channels and Word- of-Mouth Recruitment

[8] The cannery workers urge reversal on the ground that the district court's findings failed to address the discriminatory nature of separate hiring channels and word-of-mouth recruitment. We are troubled by this omission. There is, however, sufficient indication that the court considered the practices and apparently found them explained by the companies' professed concerns with honoring their commitments to various unions and finding appropriately skilled workers. See Nicholson v. Board of Education, 682 F.2d 858, 866 (9th Cir. 1982).

The cannery workers argue that word-of-mouth recruitment and recruitment for skilled jobs in different channels from those used to fill unskilled jobs are a significant cause of the disparity in the jobs held by whites and nonwhites. Specifically, the companies sought cannery workers in Native villages and through dispatches from ILWU Local 37, thus securing a work force for the lowest paying jobs which was predominantly Alaska Native and Filipino. For other departments the companies relied on informal word-of-mouth recruitment by predominantly white superintendents and foremen, who recruited primarily white employees. That such practices can cause a discriminatory impact is obvious. See Domingo, 727 F.2d at 1435-36. This court has long recognized the contribution of separate hiring channels to proving the disparate impact of a pattern or practice

of discrimination. In United States v. Ironworkers Local 86, 443 F.2d 544, 548 (9th Cir.), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971), which involved both treatment and impact claims, we held that the "active recruitment of whites, while at the same time giving little or no publicity to information concerning procedures for gaining union membership, work referral opportunities, and the operation of the apprenticeship programs in the black community," was probative of a pattern or practice of discrimination against blacks in the construction industry. Other courts, too, have long recognized that word-of-mouth recruiting is "discriminatory because of its tendency to perpetuate the all-white composition of a work force." Barnett v. W.T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975).

The defendant companies do not claim their practices have no impact, rather they assert business justifications for the practices. The companies say there are no people qualified for skilled jobs in the channels they tap for cannery worker positions, namely Local 37 and the Native villages. However, in considering the claims of the twenty-two individuals who alleged they had been discriminated against, the district court did not find they lacked qualifications, but rather that they did not make timely applications. Thus, there is evidence that some of the people counted in the comparative statistics may be qualified for skilled jobs, and it is not disputed they could fill the at-issue unskilled jobs.

We also point out that logic simply does not support the inference, in a time of widespread unemployment and

underemployment, that persons who hold, or are willing to take unskilled jobs, lack the skills for other, more demanding and higher paying jobs. The burden must shift to the companies to prove the business necessity of this practice. The district court observed that it is not a reasonable business practice to seek skilled workers in remote, sparsely populated regions. We cannot agree without a more specific development of the facts and rationale that would explain why it would be unreasonable to notify all potential employees of all the job openings available.

We also agree with the plaintiffs that the district court may have erred in crediting the companies' claims that the people in the channels from which it recruited for unskilled jobs were unavailable for preseason work and thus did not meet one of the requirements for

many of the at-issue jobs. Residents of Alaska villages would logically be available for the preseason and the evidence simply does not support the broad conclusion that members of Local 37 were unavailable. The preseason begins in May and the season's work begins in June and broad statistics do not tell us enough about the availability of otherwise qualified individuals.

d. Rehire Preferences

[9] The salmon canneries give rehire preference to past employees in their old jobs. When jobs are racially stratified, giving rehire preference to former employees tends to perpetuate the existing stratification. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 349, 97 S.Ct. 1843, 1861, 52 L.Ed.2d 396 (1977). It is not clear whether the district court considered whether this practice derived

from an intent to discriminate. When it addressed the obvious disparate impact of the practice it held that rehires were justified by business necessity. The court found that the short season and dangers of the industry justified the rehire practice. This finding is supported by the evidence.

3. Race Labeling, Housing and Messing

[10-12] Race labeling is pervasive at the salmon canneries, where "Filipinos" work with the "Iron Chink" before retiring to their "Flip bunkhouse." The district court did not find the conduct laudatory but found that it was not "persuasive evidence of discriminatory intent." Perhaps not, but the court must carry the analysis further and consider whether such a practice has any adverse impact upon minority people, i.e., whether it operates as a headwind to minority advancement.

The vast majority of cannery employees live at the canneries during the season in bunkhouses provided by the companies. The plaintiff class claimed that nonwhites, particularly Filipinos, were segregated from whites and placed in infereior bunkhouses because of racial discrimination. The district court found that the cannery workers established a prima facie case of intentional discrimination, but that the defendants' evidence proved nondiscriminatory motivations which the class failed to prove pretextual. Specifcally, the court found that the employees were housed by their time of arrival and by crew rather than with an intent to discriminate. The record contains sufficient evidence to support the district court's conclusion that the companies articulated a nondiscriminatory reason for their practice.

Cannery workers were also fed separately from the remainder of the work force. They alleged that this was due to racial discrimination. The district court agreed that they had established a prima facie case of intentional discrimination, but that the defendants had met their burden of production and the cannery workers had not proved pretext. It is undisputed that the cannery worker mess halls served what is termed a "traditional" oriental menu. The district court noted that the Local 37 contract provided for a separate culinary crew, and that Filipino and Asian persons dominated the membership in Local 37. Further, the court found that the quality and quantity of food served in the respective mess halls were the responsibility of the respective cooks, and that the older cannery workers preferred the traditional menu, to which

the younger workers acceded. The court concluded that complaints about the food were attributable to personal taste, and that the segregated messing arrangement was attributable to the union and not the conduct of defendants. There is support in the record for these findings, and we cannot find them clearly erroneous.

The district court also evaluated the complaints of segregated housing and messing under the impact theory and found that business necessity justified these practices. See Wambheim v. J.C. Penney, 705 F.2d 1492 (9th Cir. 1983) (impact analysis applies in employment benefits cases), cert. denied, 467 U.S. 1255, 104 S.Ct. 3544, 82 L.Ed.2d 848 (1984). The impact is clear in this case. The segregated housing aggravated the isolation of the non-white workers from the "web of information" spread by word-of-mouth among white people about the

better paying jobs. See Domingo, 445 F.Supp. 421, 435 (W.D. Wash. 1977), aff'd, 727 F.2d 1429 (9th Cir.), modified, 742 F.2d 520 (9th Cir. 1984). But the district court found the companies could not be required to winterize all of their housing when bunkhouse assignment by date of availability renders such an expenditure unnecessary. We hold that such a rationalization is not sufficient, without more, to sustain a finding of business necessity. Efforts to economize may be viewed as a business necessity only if the companies substantiate that these measures are clearly necessary to promote the proficient operation of the business. See Chrisner, 645 F.2d at 1262. Even if economizing is seen as a business necessity, the plaintiffs must have the opportunity to show that it could be accomplished with a lesser impact upon

the nonwhite people in the cannery work force.

The court found the separate mess facilities mandated by the employer-union agreements with Local 37. Since it also correctly noted that an agreement with a union will not immunize an employer from discrimination claims, Williams v. Owens-Illinois, Inc., 665 F.2d 918, 926 (9th Cir.), cert. denied, 459 U.S. 971, 103 S.Ct. 302, 74 L.Ed.2d 283 (1982), we are unsure what its conclusion was as to the discriminatory impact of separate messing.

In assessing how racial labeling and segregated housing and messing facilities may cause an adverse impact we suggest that the court consider the message that such practice conveys to the general population. As the Supreme Court has warned:

> The ["whites only"] message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices--by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquires, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups.

Teamsters, 431 U.S. at 365, 97 S.Ct. at 1870.

C. Individual Claims

[13] Twenty two plaintiffs alleged that they were either overtly discriminated against in the hiring for at-issue positions, or that they were deterred from seeking at-issue positions because of the defendants' alleged history of pervasive discrimination. The district court correctly noted that a plaintiff seeking relief under 42 U.S.C. § 1981 must show intentional discrimination and then analyzed the

§ 1981 and the Title VII treatment claims under the McDonnell Douglas test. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). The court found the individuals had failed to establish a prima facie case because they could not show they had applied for existing job openings and thus no inference of discriminatory intent arose. They had made oral inquiries, which were not considered applications, or their applications were untimely. Applications could be untimely if made too early or too late. Testimony showed that some plaintiffs had orally inquired during one season about positions for the next season a year away, and such inquiries were not considered an application unless followed up by a written application to the home office during the winter. Conversely, because the companies

generally received far more applications than there were job vacancies, an application was untimely if received after the opening was filled. The district court found that the defendants did not treat whites and nowhites differently in these respects. The court also found that some applicants had been unavailable for preseason work and, therefore, unavailable for the positions they desired. While there is evidence in the record to support the district court's findings regarding these individual claims, the findings are premature in light of the decision that the practices of these employers must be evaluated for disparate impact.

The cannery workers argue persuasively that the companies' use of separate hiring channels and word-of-mouth recruitment, and their failure to announce vacancies should serve to excuse

the cannery workers from the necessity of establishing the timeliness of their applications and automatically elevate oral inquiries to the status of applications. See O'Brien v. Sky Chefs, 670 F.2d 864, 868 (9th Cir. 1982), overruled on other grounds, Atonio, 810 F.2d 1477 (en banc). The cannery workers' argument derives from a discussion of damages issues in Domingo, 727 F.2d at 1445. In Domingo we said it would be an unrealistic burden on claimants to prove timely applications when application procedures were informal and word-of-mouth recruitment made it difficult for present or prospective employees to become aware of openings when they occurred. Id. For the same reasons, if the district court in this case finds that the challenged practices violate Title VII under the impact analysis, it must then conduct additional proceedings

to determine appropriate individual relief, even though individuals have not persuaded the court of their disparate treatment. See Teamsters, 431 U.S. at 361, 97 S.Ct. at 1867; Franks, 424 U.S. at 773 n. 32, 96 S.Ct. at 1268 n. 32.

D. The Motion for Attorney's Fees

We decline to entertain any motion for attorney's fees at this point in this litigation. There are issues of fact and law remaining for determination. We leave to the district court to determine, upon proper motions, properly supported, whether and to wh t extent any party is a prevailing party for the purposes of an award of attorney's fees. See Hensley v. Echerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). If any fee award is made it shall include appropriate consideration of fees for this appeal and all proceedings in the district court.

The judgment is VACATED and the cause is REMANDED for further proceedings consistent with this opinion.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK ATONIO, EUGENE BACLIG, RANDY del FIERRO, CLARKE KIDO, LESTER KURAMOTO, ALAN LEW, CURTIS LEW, ROBERT MORRIS, JOAQUIN ARRUIZA, BARBARA VIERNES, as administratrix of the Estate of Gene Allen Viernes, and all others similarly situated,

Plaintiffs-Appellants,

vs.

WARDS COVE PACKING COMPANY, INC., CASTLE & COOKE, INC., and COLUMBIA WARDS FISHERIES,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

PETITION FOR REHEARING (FRAP 40)

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I.

INTRODUCTION

In counsel's judgment, the court's opinion filed on September 2, 1987 overlooked a material point of fact dealing with a principal contention of defendants.

II.

ARGUMENT

The opinion of the court states, in pertinent part (slip op. at 14):

> The defendant companies do not claim their practices have no impact, rather they assert business justifications for the practices. The companies say there are no people qualified for skilled jobs in the channels they tap for cannery worker positions, namely Local 37 and the native villages.

The opinion also states (slip op. at 12) that the defendants argue that there are no qualified nonwhites for the at-issue jobs.

Defendants, on the contrary, do dispute that their practices have disparate impact. See defendants' opening brief (Brief of Appellees), pp. 8-13, 25-26, 28-29, 34-35, and 45-46; Supplemental Brief of Appellees, pp. 1, 3, 4, and 5.

Nor do defendants argue that there are no people qualified for skilled jobs in the relevant labor supply, the cannery workers union, or in the remote areas of Alaska. Those sources of employees are but one slice of the overall labor supply that is approximately 10% minority. District Court op. at 20, Finding of Fact 107; Brief of Appellees, p. 8. Defendants did hire qualified minorities in every job classification. Finding of Fact 123.

It is central to defendants' position that plaintiffs did not show disparate impact. The panel opinion

apparently overlooked this argument. I
is requested that the court permi
reargument on the application of th
disparate impact analysis on the facts o
this case.

DATED September 16, 1987.

DOUGLAS M. FRYER,

DOUGLAS M. DUNCAN,

RICHARD L. PHILLIPS,

of Mikkelborg, Broz, Wells,
Fryer & Yates,
Attorneys for Appellees.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on September 16, 1987, I served the foregoing Petition for Rehearing, by causing two copies thereof to be mailed, postage prepad, to counsel for plaintiffs-appellants, as follows:

Abraham A. Arditi, Esq.
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DOUGLAS M. DUNCAN,

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK ATONIO, EUGENE BACLIG, RANDY del FIERRO, CLARKE KIDO, LESTER KURAMOTO, ALAN LEW, CURTIS LEW, ROBERT MORRIS, JOAQUIN ARRUIZA, BARBARA VIERNES, as administratrix of the estate of Gene Allen Viernes, and all others similarly situated, Plaintiffs-Appellants, vs. WARDS COVE PACKING COMPANY, INC., CASTLE & COOKE, INC., and COLUMBIA WARDS FISHERIES, Defendants-Appellees.	Nos. 83-4263 84-3527 D.C. No. CV 74-145 JLQ **ORDER CLARIFYING OPINION**

Before: CHOY, ANDERSON, and TANG, Circuit Judges.

Disparate impact claims against joint venturers Wards Cove Packing Co. and Castle & Cooke, Inc. were extinguished by the failure to ever file discrimination charges against Wards Cove or Castle in their capacity as joint venturers and by the failure to file a timely EEOC charge against the joint venture, Columbia Wards Fisheries. Atonio v. Wards Cove Packing Co., 768 F.2d 1120, 1124-25 (9th Cir.), withdrawn on other grounds, 787 F.2d 462 (9th Cir. 1985).

Filed by Cathy A. Catterson, Clerk of United States Court of Appeals Ninth Circuit on November 12, 1987.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK ATONIO, EUGENE BACLIG, RANDY del FIERRO, CLARKE KIDO, LESTER KURAMOTO, ALAN LEW, CURTIS LEW, ROBERT MORRIS, JOAQUIN ARRUIZA, BARBARA VIERNES, as administratrix of the estate of Gene Allen Viernes, and all others similarly situated, Plaintiffs-Appellants, vs. WARDS COVE PACKING COMPANY, INC., CASTLE & COOKE, INC., and COLUMBIA WARDS FISHERIES, Defendants-Appellees.	Nos. 83-4263 84-3527 D.C. No. CV 74-145 JLQ **ORDER DENYING PETITION FOR REHEARING**

Before: CHOY, ANDERSON, and TANG, Circuit Judges.

The panel has considered the Petition for Rehearing. The Petition for Rehearing is denied.

Filed by Cathy A. Catterson, Clerk of United States Court of Appeals Ninth Circuit on November 12, 1987.